

No. 11286.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNIVERSAL PICTURES COMPANY, INC., a Delaware Corporation, and CLYDE BRUCKMAN,

Appellants,

vs.

HAROLD LLOYD CORPORATION, a California corporation,

Appellee.

HAROLD LLOYD CORPORATION, a California corporation,

Appellant,

vs.

UNIVERSAL PICTURES COMPANY, INC., a Delaware Corporation, and CLYDE BRUCKMAN,

Appellees.

BRIEF FOR APPELLEE, HAROLD LLOYD CORPORATION.

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BRIEF FOR APPELLEE, HAROLD LLOYD CORPORATION.

Preliminary Comment Upon Brief Filed by Appellant Universal.

Reluctantly we feel compelled to advise this Court that the Opening Brief filed by appellant Universal Pictures is so misleading in its statement of the evidence that sub-

stantially no reliance may be placed thereon. Equally misleading are its legal arguments on the issues of liability and damages because they assume a factual situation contrary to the actual evidence in the case and to the findings of fact made by the Trial Court.

On the first page of its brief appellant Universal states that the defendant's appeal is "from a judgment . . . holding that plaintiff's copyright . . . has been *infringed by the use of six gags or pieces of stage business used in a comedy routine in the motion picture of defendant Universal.*" (App. Op. Br. p. 1.) No such phraseology appears in the findings or judgment of the Trial Court. In fact, defendants have appealed from a judgment holding plaintiff's copyright to have been infringed by defendant's acts in copying "57 consecutive scenes" from plaintiff's picture. [Tr. p. 42.] Furthermore, the Trial Court expressly found that "the characters, characterization, motivation, treatment, action and sequence of action" appearing in such sequence of 57 consecutive scenes was "*knowingly, wilfully and deliberately copied, misappropriated and plagiarized by defendants, and each of them, from the last 300 feet of Reel 7 and the first 700 feet of Reel 8 of plaintiff's copyrighted motion picture photoplay entitled 'MOVIE CRAZY.'*" [Tr. p. 34.]

A bare reading of the findings and judgment of the Trial Court thus discloses the "holding" of the judgment to be far different from that stated by counsel for appellant Universal.

Another illustrative distortion occurs in Universal's repeated statements that the Trial Court *erroneously* found as a fact "that the exhibition of defendant's picture continued after notice of plaintiff's alleged claim" (App. Uni-

versal's Op. Br. pp. 38, 71),* and the inference that appellant Universal had no knowledge whatever that it was infringing plaintiff's rights until fifteen months after it had produced, distributed and released its infringing picture. (App. Universal's Op. Br. p. 72.) Appellant Universal even goes so far as to claim (contrary to the only evidence in the case) "that plaintiff had *deliberately* failed to notify defendants of the alleged infringement until over fifteen months after the general release of defendant's picture." (App.Op. Br. p. 7.)

The truth is that plaintiff did give a written notice to Universal [Defendant's Ex. G; Tr. pp. 386-387] in March, 1945, concerning a whole series of copyright infringements by several different Universal pictures, of which "So's YOUR UNCLE" was only one of many; and the evidence is uncontradicted that this notice was given "not very long" after the matter was first called to Lloyd's attention. [Tr. p. 153.] There was no evidence that any one in the Lloyd organization had ever heard of any infringements by any Universal picture prior to March, 1945, and shortly before Lloyd's counsel notified Universal to cease and desist from distribution of all infringing pictures.

*Defendant Universal's answer supports the finding of the Trial Court for it contains the following express admission:

"this answering defendant admits that on or about the 20th day of March, 1945, plaintiff gave this defendant a notice in writing, demanding that said defendant cease and desist from further distribution, exhibition or release of said defendant's motion picture photoplay entitled 'So's YOUR UNCLE.' and admits that said defendant has continued with the distribution and exhibition of said motion picture photoplay." [Tr. p. 20.]

Defendant Universal verified this answer June 2, 1945. [Tr. p. 21.]

However, the finding of the Trial Court [Finding VIII, Tr. p. 35], that during the years 1943, 1944 and 1945 defendants "at all times were fully informed and had full knowledge that they were infringing upon plaintiff's copyright" did not rest (as appellant Universal implies) upon the *written* notice received in evidence as Defendant's Exhibit G, but upon the uncontradicted evidence of the defendant Bruckman that the time he wrote the sequence in defendant Universal's picture "So's YOUR UNCLE" he deliberately "patterned" the same upon the identical sequence in plaintiff's motion picture "MOVIE CRAZY"; and that *he had so informed Universal's producer, Jean Yarbrough*. [Tr. p. 95.]

Predicated upon this admission by the defendant Bruckman, and upon abundant additional evidence (both "internal" and otherwise), the Trial Court made the following finding of fact [Tr. p. 34]:

"That during the year 1943 the individual defendant Clyde Bruckman was employed by the defendant Universal Pictures Co. Inc. in the capacity of writer and to assist in the writing of a certain motion picture photoplay entitled 'So's YOUR UNCLE' which photoplay was then in the course of preparation and production by the defendant Universal Pictures Co. Inc. That the individual producer placed in charge of said motion picture production by said defendant corporation was one Jean Yarbrough and at all times hereinafter mentioned said defendants Yarbrough and Bruckman and said defendant Universal Pictures Co. Inc. were *fully informed* and had *full knowledge* that that certain sequence of fifty or more consecutive scenes constituting the so-called 'magician's coat sequence' hereinafter more specifically de-

scribed, was copied and misappropriated by defendants and each of them in said motion picture photoplay entitled 'So's YOUR UNCLE' from plaintiff's motion picture photoplay entitled 'MOVIE CRAZY.' That said sequence consists of the last three hundred feet of reel seven and the first seven hundred feet of reel eight of 'MOVIE CRAZY' and the counterpart of said scenes and sequence consist of the first fifty-seven scenes and first six hundred feet of the fourth reel of defendant's motion picture photoplay entitled 'So's YOUR UNCLE.' That the characters, characterization, motivation, treatment, action and sequence of action, appearing in said portion of said fourth reel of defendant's said motion picture photoplay entitled 'So's YOUR UNCLE' were *knowingly, wilfully and deliberately copied*, misappropriated and plagiarized by defendants and each of them from said portion of the seventh and eighth reels of plaintiff's said motion picture photoplay entitled 'MOVIE CRAZY.'" [Finding VII, Tr. p. 34.]

Defendant Universal does not dare to contend openly that this finding of *knowing, wilful and deliberate* copying is unsupported by the evidence. Yet by *ignoring* both finding of fact VII and the evidence supporting it and by referring only to the written notice given by the plaintiff after it discovered defendants' infringements, defendants infer that Finding VIII of continued distribution and exhibition "with notice and knowledge of plaintiff's rights in the premises" was *wholly predicated* upon the written notice of March 20th and was not in any respect based upon the admissions in defendants' answer [Tr. p. 20], or the deliberate copying blandly confessed by the defendant Bruckman and concurred in by Universal's pro-

ducer Jean Yarbrough who was placed in charge of the infringing production by Universal.

Appellant Universal Pictures Company, Inc., is peculiarly chargeable with knowledge and notice of the matters specifically entrusted to their agent and producer Jean Yarbrough and to their agent and employee Clyde Bruckman; both of whom were acting within the course and scope of their specific agency and employment in wilfully incorporating into Universal's motion picture material which they knew was "suggested by and patterned after" the Harold Lloyd motion picture "Movie Crazy." The rule is well settled that a corporation is chargeable with knowledge and notice of matters becoming known to its agents and employees within the course and scope of their agency and employment (*Fletcher Cyclopaedia of the Law of Private Corporations*, Vol. 4, Chap. 42, Par. 2215, page 3430, citing *Simmons Creek Coal v. Doran*, 142 U. S. 417, 35 L. Ed. 1063; *Duncan v. Jauden*, 15 Wall. 165, 21 L. Ed. 142, and innumerable decisions in state and Federal courts throughout the country).

See also:

Curtis Co. v. U. S., 262 U. S. 215, 222, 43 S. Ct. 570, 67 L. Ed. 956;

Schneider v. Thompson, 58 F. (2d) 94, 96;

Shapiro v. Bernstein Co. v. Belten, 47 Fed. Supp. 648.

Appellant Universal's legal argument that plaintiff's damages should be limited to \$5,000 because defendant "established that it was not aware that it was infringing and that such infringement could not have been reasonably foreseen" (Br. p. 66) deliberately disregards all evidence

of wilful copying by its writer and producer as well as the findings of fact made by the Trial Court that the piracy was *not* accidental but was knowing, wilful and deliberate.* Furthermore, the Trial Court expressly found to the contrary [Finding VIII, Tr. p. 35]:

“ . . . that defendants and each of them at all times were fully informed and had full knowledge that they were infringing upon plaintiff’s copyright and the court further finds that the defendant Universal Pictures Company Inc. could and should have reasonably foreseen said infringements upon plaintiff’s copyright.”

In view of this finding and of the uncontradicted evidence of the defendants that at all times during the production of the infringing motion picture Universal’s writer Bruckman and Universal’s producer Yarbrough fully recognized that the infringing sequence was “suggested by and patterned after” the Harold Lloyd picture “MOVIE CRAZY” [Tr. pp. 95-96], it is obvious that appellant Universal cannot support its claim that it “*estab-*

*Defendant’s argument is particularly inapplicable for still another reason: In no event does the \$5,000 limitation apply to *actual* damages. The limitation is solely upon *statutory* damages where the infringer establishes his innocence, his ignorance, and his inability to reasonably foresee infringements.

The statute expressly provides that the limitation upon recovery of statutory damages is one of the “exceptions” which “shall not deprive the copyright proprietor of any other remedy given him under this law” (*e. g.*, actual damages).

Amdur states in his treatise on “*Copyright Law and Practice*” at p. 1155:

“In awarding *actual* damages and profits the court is not restricted by the maximum limitation, *this applying only to statutory damages.*”

lished that it was not aware it was infringing and that such infringement could not have been reasonably foreseen.” (Br. p. 66.)

Appellant Universal’s so-called “Statement of the Case” (Br. pp. 31-39) is equally without merit. It does not fairly state the facts nor “succinctly” present the questions involved upon this appeal. Since the Rules of this Court require us to indicate whether or not we agree with this Statement, we desire to state that we do not concur in any of the statements or conclusions contained therein and we respectfully refer the Court to the entire record.

For example, the first words in appellant Universal’s “Statement of the Case” are: “*Plaintiff’s* witness Hirli-
man testified,” etc. (Br. p. 31.) Hirli-
man was *not* plaintiff’s witness but was called and testified solely on behalf of the defendants. [See Tr. p. 420.]

Appellant’s discussion of Hirli-
man’s testimony is equally misleading because the pages of the transcript referred to do *not* contain any of the language attributed by Universal’s counsel to the witness, *e. g.*, “gags,” “stage business,” “comedy routine,” “comedy accretion,” etc. [See Tr. pp. 447-448.] These terms are supplied solely by appellant’s counsel.

Similarly misleading is the statement that the Trial Court “recognized that as this sequence was not a part of the general theme, it could be deleted without affecting the picture.” (Br. p. 33.) The Trial Court did *not* so state and its oral opinion [Tr. p. 520] and findings of fact [Tr. p. 34] are to the contrary.

Under sub-heading (b) (Br. p. 33) defendant’s counsel again injects the words “gags,” “stage business,” and “comedy routine,” into what purports to be Lloyd’s testi-

mony, stating that Lloyd “conceded” that the 57 consecutive scenes slavishly copied by defendants was a “sequence of gags,” and that the court acquiesced in the contention that the “sequence of these ‘gags’ or ‘stage business’ was the subject of copyright protection.” (Br. p. 33.) Lloyd did *not* so concede nor was the opinion, findings or judgment of the Court restricted in the manner stated by Universal’s counsel. Lloyd did testify that there were “gags *within* the comedy scene” but expressly stated that it was the “*succession of comedy scenes* which make up the whole sequence.” [Tr. p. 137.]

If (a) and (b) are intended to present a “question involved” as to copyright protection afforded a major sequence in a motion picture photoplay, see our Point II, *post*, pp. 27-33, that an original combination of characters, scenes and incidents arranged in a new pattern and sequence, is protected and is both “material” and “substantial.” (Point II (A), *post*, p. 34.)

Under subdivision (c) (Br. p. 34) defendant Universal apparently objects to the Trial Court’s consistency in excluding defendant’s offered evidence as to the price paid for a “silent” motion picture “GIRL SHY” [Tr. p. 447], after the Court had sustained defendant’s objections to similar proof offered by plaintiff with respect to comparable “talking” motion pictures like “MOVIE CRAZY.” [Tr. pp. 107-109, 377-381.] Defendants make five consecutive completely erroneous statements on page 35 which we answer in our Appendix hereto. The only legal point appears to be defendant’s highly misleading argument that the Trial Court “assessed damages upon the erroneous theory . . . that it could add such arbitrary amount” of damages to defendant’s profits as it might deem proper

under the “in lieu of” provision of Section 25 of the Copyright Act. (Br. pp. 35-37.) The truth is that the Trial Court did *not* award “arbitrary damages under the ‘in lieu of’ provision of Section 25”; nor did it “add” arbitrary damages to defendants’ profits in reaching its final determination as to the amount of actual damages sustained. The Trial Court clearly stated that it was fixing *actual* damages suffered by the plaintiff and not “arbitrary damages” or “statutory damages”:

“It is my function to try to ascertain an amount that I believe is the *actual damage* suffered and in arriving at actual damages I base them upon what in my opinion is the lessened value of that copyright. In other words, I believe that in a case of this character the only way that actual damages could be established would be to determine the lessened value of the picture by reason of the infringement. There may be other ways, but that is the method that I have followed in this case. I find and fix the actual damages suffered by Mr. Lloyd is the sum of \$40,000.00.” [Tr. p. 522.]

Upon our cross-appeal we contended, and still contend, that the evidence supports a judgment for actual damages of at least \$250,000. (Op. Br. for cross-appellant Harold Lloyd Corporation pp. 15-24.) *A fortiori* if the evidence would sustain a judgment for \$250,000 actual damages, a judgment of \$40,000 is abundantly supported by the same evidence.

Under subdivision (d) (Br. p. 38) appellant Universal states the Trial Court “fixed” (viz., based) its judgment of \$40,000 damages “upon the erroneous finding” that Universal continued distribution of the picture “with notice and knowledge of plaintiff’s rights in the premises”

and would continue so to do “unless permanently restrained and enjoined from so doing.” (Universal Br. p. 38.) No statement could be farther from the truth. Plaintiff’s first cause of action was solely for damages although plaintiff alleged full notice and knowledge by the defendants “at all times.” [Tr. p. 5.] Since Universal’s writer Bruckman and producer Yarbrough were at all times fully informed that Universal’s sequence was “patterned” after the Harold Lloyd sequence in “MOVIE CRAZY” [Tr. pp. 95-96] the Trial Court’s finding is based upon uncontradicted evidence. Plaintiff’s second cause of action for an injunction did allege that “Defendants have continued to infringe upon plaintiff’s said copyright by continuing to release, distribute and exhibit said motion picture to the public and defendants threaten and intend to continue so to do.” [Tr. p. 6, par. II.] But in its answer, defendant Universal admitted receipt of plaintiff’s written notice dated March 20, 1945, and “*admits that said defendant has continued with the distribution and exhibition of said motion picture photoplay.*” [Tr. p. 20, Par. II.] Universal’s answer was verified June 2, 1945 [Tr. p. 21], so the finding of the Trial Court [Tr. p. 36, Par. II] is fully supported by the admission contained in Universal’s own answer.

It is furthermore untrue that plaintiff “stipulated that exhibition of defendant’s picture had been stopped upon the receipt of plaintiff’s notice of infringement.” (Universal Op. Br. p. 39.) The record shows a stipulation that Universal sent instructions to its exchanges to stop the exhibition but the exact date of such instructions was never given and plaintiff’s counsel expressly stated “I will not stipulate the instructions were complied with.” [Tr. p. 452.]

Furthermore, on September 13, 1946, *six months after the written notice*, Universal's counsel had stated in open court that the picture "*will be*" *withdrawn* [Tr. p. 345]; he later expressly stated he did not contend that plaintiff was not entitled to an injunction. [Tr. p. 452.]*

There is no basis whatever for appellant Universal's statement that "the Court fixed such damages in the sum of \$40,000 upon the erroneous finding" of continued exhibition and distribution of the picture. (Universal Br. p. 38.) The damages had already accrued and were wholly predicated upon infringements occurring prior to the institution of the lawsuit as alleged in the first cause of action of the complaint. [Tr. p. 5, Pars. X and XI.]

Under subdivision (e) appellant Universal implies that the total damages sustained by plaintiff from both *Columbia's* infringements and Universal's infringements aggregated \$40,000 and that the Court was in error in not specifying the amount of damage plaintiff sustained through Columbia's infringements. (Universal Br. p. 39.) The damage done by Columbia's infringements was not pleaded in mitigation and the amount of such damages was not an issue in this lawsuit.**

The Court gave defendants the benefit of every doubt, however, when it stated that the evidence offered by it respecting the Columbia short had "minimized the actual

*"Mr. Fendler: You do not contend the plaintiff is not entitled to an injunction, do you?

Mr. Abeles: No." [Tr. p. 452.]

**Harold Lloyd testified he never heard of the infringing Columbia short until "just a few days" before he testified on the trial of this action. [Tr. p. 151.] Defendant's witness Adler testified he had never seen the Columbia short and did not believe they played around Los Angeles. [Tr. p. 336.] The files of the U. S. Dis-

damage” sustained through defendant Universal’s infringements. [Tr. p. 521.] Defendants are hardly in a position to now complain that had it not been for Columbia’s infringements, the Court would unquestionably have found the damages sustained by plaintiff through Universal’s infringements to have been *much more* than \$40,000. The finding of the Trial Court is specific upon the point that \$40,000 was the amount of damages sustained by plaintiff “*by reason of said infringements by defendants and each of them.*” [Tr. p. 35, Par. IX. See also Finding X, Tr. p. 36, and Conclusion of Law III, Tr. p. 39; Judgment, Tr. pp. 42-43.]

Restatement of Case and Issues.

Because appellant Universal has failed to state the issues, and appellant Bruckman’s “Statement of the Case” is merely a highly colored argument, we desire to restate the major issues involved upon this appeal (excluding the issues raised by our cross-appeal):

They are as follows:

1. Is there any substantial evidence to support the findings of fact by the Trial Court that defendants deliberately misappropriated a major sequence from plaintiff’s photoplay and does such piracy constitute infringement of plaintiff’s copyright?
2. Is there any substantial evidence to sustain the findings of fact by the Trial Court that plaintiff sustained at least \$40,000 actual damages as a result of defendants’ infringements?

strict Court for the Southern District of California, Central Division, in action No. 5184-W, reflect the fact that the Harold Lloyd Corporation filed suit several months ago against Columbia Pictures Corporation and Clyde Bruckman for infringements by the Columbia “short.”

SUMMARY OF ARGUMENT.

Point I.

PLAINTIFF'S MOTION PICTURE "MOVIE CRAZY"
IS A "DRAMATIC WORK" PROTECTIBLE UNDER
SUB. (d), SECTION 1, OF THE COPYRIGHT ACT.
Page 24.

Vitaphone Corp. v. Hutchinson, 19 Fed. Supp. 359;

18 *Corpus Juris Secundum* 233;

Tiffany Productions v. Dewing, 50 F. (2d) 911;

Kalem v. Harper Bros., 222 U. S. 55, 32 S. Ct.
55, 56 L. Ed. 92;

Patterson v. Century Productions, Inc., 19 Fed.
Supp. 30, affirmed 93 F. (2d) 489; Cert. Den.
303 U. S. 655, 58 S. Ct. 759, 82 L. Ed. 1114.

Point II.

FIFTY-SEVEN CONSECUTIVE COMEDY SCENES CON-
STITUTING ONE THOUSAND CONSECUTIVE
FEET OF FILM AND 20% OF PLAINTIFF'S EN-
TIRE FEATURE LENGTH PHOTOPLAY IS PRO-
TECTIBLE UNDER THE COPYRIGHT LAWS BE-
CAUSE IT CONSTITUTES A NEW, NOVEL AND
ORIGINAL COMBINATION OF CHARACTERS,
SCENES AND INCIDENTS ARRANGED IN A NEW
PATTERN AND SEQUENCE. Page 27.

13 *Corpus Juris* 1146;

Vitaphone Corp. v. Hutchinson, 19 Fed. Supp. 359,
at 360;

Patterson v. Century Productions, Inc., 19 Fed.
Supp. 872;

Detective Comics, Inc. v. Bruns Publications, Inc.,
111 F. (2d) 432 (C. C. A. 2);

Fleischer Studios, Inc. v. Freundlich, Inc., 5 Fed. Supp. 808 (affirmed 73 F. (2d) 276 (2d C. C. A.)); (Cert. Den. 294 U. S. 717, 55 S. Ct. 516, 79 L. Ed. 1250);
Sheldon v. Metro-Goldwyn-Mayer Pictures Corp., 81 F. (2d) 49, 54;
Italian Book Co. v. Rossi, 27 F. (2d) 1014;
National Institute v. Nutt, 28 F. (2d) 132, 134 (affirmed 31 F. (2d) 236);
Edwards & Deutsch v. Boorman, 15 F. (2d) 35;
Dymow v. Bolton, 11 F. (2d) 690, 692;
Corelli v. Gray, 30 L. T. Rep. 116.

- (A) Misappropriation of a Major Sequence in a Feature Length Motion Picture Constitutes Infringement of a "Material Portion" and a "Substantial Part" of Plaintiff's Copyrighted Work. The Whole Need Not be Taken in Order to Constitute Piracy. Page 34.

National Institute v. Nutt, 28 F. (2d) 132, at 135;
Ansehl v. Puritan Pharmaceutical Co. (8th C. C. A.), 61 F. (2d) 131; (Cert. Den. 287 U. S. 666, 53 S. Ct. 224, 77 L. Ed. 374);
Boosey v. Empire Music Co., Inc., 224 Fed. Rep. 646;
Chicago Record-Herald Co. v. Tribune Assn., 275 Fed. Rep. 979;
King Features Syndicate v. Fleischer (2d C. C. A.), 299 Fed. 533;
Hartfield v. Peterson (2d C. C. A.), 34 U. S. P. Q. 305, 91 F. (2d) 998;
Hill v. Whalen, 220 Fed. 359;
DeAcosta v. Brown (2d C. C. A.), 146 F. (2d) 408 (Cert. Den. 325 U. S. 862, 65 S. Ct. 1198, 89 L. Ed.);
Sheldon v. Metro-Goldwyn-Mayer (2d C. C. A.), 81 F. (2d) 49.

- (B) Purported Dissimilarities, Changes, Omissions, Additions, and Variations Made by Defendants Will Not Excuse, Exonerate, or Exculpate Deliberate Infringement. Page 36.

Boosey v. Empire Music Co., 224 Fed. 646, 647;
Nutt v. National Institute, 31 F. (2d) 236 (2d C. C. A.);

King Features Syndicate v. Fleischer, 299 Fed. 533 (2d C. C. A.);

Fleischer Studios Inc. v. Freundlich Inc., 73 F. (2d) 276;

Daly v. Palmer, 6 Fed. Cas. 3552;

Dam v. Kirk LaShelle, 166 Fed. 589 (affirmed 175 Fed. 902 (2d C. C. A.));

Maurel v. Smith, 220 Fed. 195;

Sheldon v. Metro-Goldwyn-Mayer, 81 F. (2d) 49;

Barsha v. Metro-Goldwyn-Mayer, 32 Cal. App. (2d) 556, 562.

- (C) Public Domain Is Not a Defense Where the Precise Combination and Arrangement of 57 Scenes in Consecutive Sequence Never Previously Existed in the Same Form and Combination as That Created and Devised by Plaintiff's Writers. In No Event Would Defendants Have Any Right to Copy Slavishly From Plaintiff's Work. Page 39.

Fisher v. Dillingham, 298 Fed. 145;

Detective Comics, Inc. v. Bruns Publications, Inc., 111 F. (2d) 432;

Stodart v. Mutual Film Corp., 249 Fed. 507 (Aff'd 249 Fed. 513);

Holmes v. Hearst, 174 U. S. 82, at p. 86, 19 S. Ct. 606, 43 L. Ed. 904;

Hartfield v. Peterson (2d C. C. 3), 34 U. S. P. Q. 305, 91 F. (2d) 998;

Sheldon v. Metro-Goldwyn Pictures Corp., 81 F. (2d) 49;

Harold Lloyd Corporation v. Witwer, 65 F. (2d) 1;

Italian Book Co. v. Rossi, 27 F. (2d) 1014;

National Institute v. Nutt, 28 F. (2d) 132, 134 affirmed 31 F. (2d) 236);

Holland v. Vivian Van Damm Productions, Ltd., MacGillivray's Copyright Cases 1936;

Graves v. Pocket Publications, Ltd., 54 T. L. R. 953, MacGillivray's Copyright Cases 1938.

(D) The Major Sequence Misappropriated by Defendants Does Not Consist Merely of Isolated "Gags" and Pieces of "Stage Business," Nor Mere "Comic Accretion." Defendants' Attempt to Brand or "Label" Plaintiff's Sequence Is Extremely Misleading. Page 44.

Falcon v. Famous Players Film Corp., 2 K. B. 474;

Harold Lloyd Corp. v. Witwer, 65 F. (2d) 1, 16;

Sheldon v. Metro-Goldwyn Pictures, 81 F. (2d) 49.

(E) A Major Sequence of 57 Consecutive Scenes Does Not Constitute a "Sub-section of Plot" or "Subordinate Sequence of Events" in the Sense Such Terms Have Been Used by the Courts to Describe General Theme or a Single Isolated Scene. Page 53.

Dymow v. Bolton, 11 F. (2d) 690, 692;

Harold Lloyd Corporation v. Witwer, 65 F. (2d) 1, 4, 10, 27, 28.

Point III.

WHERE PLAINTIFF PLEADS AND PROVES ACTUAL DAMAGES BY DELIBERATE WIDESPREAD INFRINGEMENTS, THE COURTS WILL NOT REQUIRE PRECISE MATHEMATICAL COMPUTATION BUT WILL AWARD A FAIR AND REASONABLE AMOUNT CONSISTENT WITH THE EVIDENCE BOTH EXPERT AND OTHERWISE. A DELIBERATE INFRINGER CANNOT RELY UPON UNCERTAINTY IN AMOUNT OF DAMAGES CAUSED BY HIS OWN WILFUL TORT. Page 58.

- (A) All of the Authorities Reflect the Well Established Rule That Mere Uncertainty as to the Amount and Extent of Damage Will Not Deprive the Plaintiff of Substantial Recovery. Page 61.

15 *Am. Jur.* (Damages), Sec. 23, p. 414; Sec. 28, pp. 493, 494;

Sinclair Refining Co. v. Jenkins Petroleum Process Co., 289 U. S. 689, 54 S. Ct. 736, 77 L. Ed. 1449;

Palmer v. Conn. Ry. Co., 311 U. S. 544, 61 S. Ct. 379, 85 L. Ed. 336;

Zinn v. Ex-Cell-O, 24 Cal. (2d) 297;

Paramount Productions v. Smith, 91 F. (2d) 863 (Cert. Den. 302 U. S. 749, 58 S. Ct. 266, 82 L. Ed. 579);

U. S. Frumentum Co. v. Lauhoff, 216 Fed. 610, 617;

President etc. v. Kelby, 147 F. (2d) 465, 476 (Cert. Den. 324 U. S. 866, 65 S. Ct. 916, 89 L. Ed.);

John B. Stetson Co. v. Stephen L. Stetson, 85 F. (2d) 586, 596 (Cert. Den. 299 U. S. 605, 57 S. Ct. 232, 81 L. Ed. 446];

Sheldon v. Metro-Goldwyn Pictures Corporation,
106 F. (2d) 45, 50;

*Gotham Silk Hosiery Company v. Artcraft Silk
Hosiery*, 147 F. (2d) 209;

American Law Institute Restatement of Torts,
Sec. 912, Comment D;

American Law Institute Restatement of Contracts,
Par. 33, Comment A;

Story Parchment Co. v. Patreson, 282 U. S. 555,
51 S. Ct. 248, 75 L. Ed. 544;

*Dowajiac Manufacturing Company v. Minnesota
Moline Plow Company*, 235 U. S. 641, 35 S.
Ct. 221, 59 L. Ed. 398.

(B) In Plagiarism Cases, as Well as All Other Cases In-
volving Personal Property, Courts Have Frequently
Awarded Damages Based on the Plaintiff's Own Testi-
mony of the Value of the Property Misappropriated.
Page 70.

Barsha v. Metro-Goldwyn-Mayer, 32 Cal. App.
(2d) 556;

Yadkoc v. Fields, 66 Cal. App. (2d) 150;

Paramore v. Mack Sennett, Inc., 9 F. (2d) 66;

Nathan v. King Features Syndicate, 32 N. Y. Supp.
(2d) 519;

Southern Express Co. v. Owens, 146 Ala. 412,
41 So. 752, 8 L. R. A. (N. S.) 369, 119 Am.
St. Rep. 41, 9 Ann. Cas. 1143;

Paramount Productions v. Smith, 91 F. (2d) 863,
866 (Cert. Den. 302 U. S. 749, 58 S. Ct. 266, 82
L. Ed. 579).

See also:

- Atlantic Monthly Company v. Post Publishing Company*, 27 F. (2d) 556;
Sacramento Sub. Fruit Lands Co. v. Soderman,
36 F. (2d) 934 (C. C. A. 9th);
22 Corpus Juris (Evidence), Sec. 863;
Union Pac. R. Co. v. Lucas, 136 Fed. 374;
Chicago etc. R. Co. v. Ohio City Lbr. Co., 214
Fed. 751;
Baltimore American Ins. Co. v. Pecos Merc. Co.,
122 F. (2d) 143;
Brookins v. Natl. Ref. Co., 26 Ohio App. 546, 26
Ohio App. 546, 160 N. E. 97;
White v. Jones, 79 App. Div. 373, 79 N. Y. Supp.
583;
Sturtevant v. Dowson, 110 Ore. 155, 222 Pac.
294.

(C) A Fortiori Is a Judgment for Damages Supported Where Not Only the Owner of the Property Misappropriated But Four Expert Witnesses Have Testified That Substantial Property Rights and Present Existing Intrinsic Property Values Have Been Impaired or Destroyed. Page 75.

- 20 *Am. Jur.* (Evidence), Sec. 890, pp. 747, 748;
McGowan v. American Pressed Tan Bark Co.,
121 U. S. 575, 7 S. Ct. 1315, 30 L. Ed. 1027;
General Paint Corp. v. Kramer, 68 F. (2d) 40
(Cert. Den. 292 U. S. 623, 54 S. Ct. 628, 78
L. Ed. 1478);
Standard Brands v. Federal Yeast Corp., 38 F.
(2d) 314;
Babcock v. Raymond, 2 Hilt. (N. Y.) 61;

Sturm v. Williams Owen Mfg. Co., 201 App. Div. 113, 193 N. Y. Supp. 852;

Walker v. Graham, 233 Ala. 539, 172 So. 655;

Gotham Silk Hosiery Company v. Artcraft Silk Hosiery Mills, 147 F. (2d) 209, 216;

Sheldon v. Metro-Goldwyn Pictures Corporation, 106 F. (2d) 45, 50, 55;

Sheldon, et al. v. Metro-Goldwyn Pictures Corp., et al., 309 U. S. 390, 408, 60 S. Ct. 681, 84 L. Ed. 825.

(D) Defendant's Cases Respecting Market Value Are Not in Point. Intrinsic Value of Property May Always Be Shown Where Market Value Does Not Exist. Page 82.

Sinclair Ref. Co. v. Jenkins, 289 U. S. 689, 699, 53 S. Ct. 736, 77 L. Ed. 1449;

Standard Oil Co. v. So. Pac. Co., 268 U. S. 146, 45 S. Ct. 465, 69 L. Ed. 890;

Feather River Lbr. Co. v. U. S., 30 F. (2d) 642 (C. C. A. 9);

Weed v. Lyons Pet., 294 Fed. 725 (affirmed 300 Fed. 1005);

Austin v. Millsbaugh & Co., 90 Miss. 354, 43 So. 305;

Jacksonville T. & K. W. Ry. Co. v. Peninsular etc. Co., 27 Fla. 1, 57, 9 So. 661, 689.

(E) Appellants Err in Contending That the Damages Found By the Court to Have Been Suffered by Plaintiff From Universal's Infringements Were Rendered Uncertain By Reason of Columbia's Infringements. Page 87.

Great A. & P. Tea Co. v. A. & P. Radio Stores, 20 Fed. Supp. 703, 706.

- (F) Defendants Err in Contending That Plaintiff's Actual Damages "Should Not Exceed the Sum of \$5,000." It Is Untrue That Defendant Universal "Established That It Was Not Aware That It Was Infringing" and That Its Infringements "Could Not Have Been Reasonably Foreseen." Defendant Universal Is Fully Chargeable With Knowledge and Notice of Matters Known to Its Agents and Employees While Acting Within the Course and Scope of Their Agency and Employment. Page 90.

Fletcher Cyclopedia of the Law of Private Corporations, Vol. 4, Chap. 42, Par. 2215, p. 3430;

Simmons Creek Coal Co. v. Doran, 142 U. S. 417, 12 S. Ct. 239, 35 L. Ed. 1063;

Curtis etc. Co. v. U. S., 262 U. S. 215, 222, 43 S. Ct. 570, 67 L. Ed. 956;

Schnieder v. Thompson, 58 F. (2d) 94, 96;

Shapiro Bernstein & Co. v. Velten, 47 Fed. Supp. 648;

Sheldon v. Metro-Goldwyn Pictures Corp., et al., 106 F. (2d) 45, 50, 309 U. S. 390, 397.

Christian v. American Druggist Syndicate, 285 Fed. 359 (C. C. A. 2d).

Point IV.

THE COURT DID NOT ERR IN SUSTAINING OBJECTIONS TO IMPROPER AND INCOMPETENT QUESTIONS ASKED HIRLIMAN. Page 93.

- (A) The Court Properly Sustained Objections to Argumentative and Improper Questions Propounded by Defendants to Harold Lloyd Whom They Called as Their Own Expert Witness and Stipulated They Would be Bound by His Testimony. Page 93.

Harold Lloyd Corporation v. Witwer, 65 F. (2d) 1, 5.

- (B) The Court Properly Excluded Hirliman's Proposed Testimony That Thirteen Years Prior to Trial, He Had Personally Purchased Reissue Rights in an Old SILENT Lloyd Picture Entitled "Girl Shy." Such Testimony Was Incompetent for All Purposes; It Did Not Contradict Lloyd, and It Could Not Establish the Value of Reissue Rights in a TALKING Picture in 1945. Page 96.

Point V.

DEFENDANT UNIVERSAL'S ATTEMPT TO INVOKE THE DOCTRINES OF LACHES AND ESTOPPEL FOR THE FIRST TIME ON APPEAL MUST FAIL. Page 99.

- (A) The Evidence Shows No Laches and in No Event Is the Doctrine Applicable to an Action at Law for Damages. Page 99.

Ferryboatman's Union of Calif. v. Northwestern Pac. R. Co., 84 F. (2d) 773 (C. C. A. 9);

Ashton v. Glaze, 95 F. (2d) 427 (C. C. A. 9);

Haas v. Leo Feist, Inc., 234 Fed. 105.

- (B) No Issue of Equitable Estoppel Was Presented in the Trial Court or Is Substantiated by the Record. Page 102.

Point VI.

APPELLANT BRUCKMAN IS A JOINT TORT FEASOR JOINTLY LIABLE AS A CONTRIBUTORY INFRINGER FOR ALL DAMAGES SUSTAINED THROUGH INFRINGEMENT UPON PLAINTIFF'S COPYRIGHT. Page 105.

Cain v. Universal Pictures Co., 47 Fed. Supp. 1013;

Harris v. Miller, 50 U. S. P. Q. 625 (D. C. S. D. N. Y.);

Gross v. Van Dyke Gravure Co., 230 Fed. 412, 414, 144 C. C. A. 554 (2d C. C. A.);

American Telephone v. Radio Audio, 281 Fed. 200, 203;

Towle v. Ross, 23 Fed. Supp. 125 (D. C. Ore.).

POINT I.

Plaintiff's Motion Picture "Movie Crazy" Is a "Dramatic Work" Protectible Under Sub. (d), Section 1, of the Copyright Act.

Appellant Bruckman contends that "plaintiff's photoplay as a whole is not within the provisions of sub. (d) of Section 1" (App. Bruckman's Op. Br. pp. 58-60) and that "plaintiff's comedy is not within the provisions of sub. (d) of Section 1 because while it is entertainment it is not dramatic composition." (App. Bruckman's Op. Br. pp. 47-49.) Appellant Bruckman is in error.

The same contention was made in *Vitaphone Corp. v. Hutchinson*, 19 Fed. Supp. 359, where the defendants contended that motion pictures consisting of only one or two reels of "slapstick comedy" were not copyrightable under Section 1(b) of the Copyright Act, but the Court stated at page 360:

"The defendants contend that these motion pictures are not within the Copyright Law. I do not think there is much merit to this contention. All of the pictures are what are known in the trade as 'shorts'—that is, they run for periods from ten to twenty minutes, and are used as fill-ins between the feature pictures, news reels, and other pictures on the program. The subjects are comedy, and while they are of the 'slapstick' type, they, nevertheless, have a story to them. . . .

"In the instant case, the reduction of the story, such as it is, to a motion picture is a dramatization of the work. I, therefore, find and rule that the copyrighted pictures in question are within the meaning and terms of the Copyright Act."

18 *Corpus Juris Secundum* 233:

“Motion picture photoplays are dramatic works within the statute and are within the meaning of the words ‘any transcription or record thereof’ giving the owner of a copyrighted drama the exclusive right to make transcriptions or records for exhibition. They may be infringed by the multiplication or sale of copies or by unlicensed exhibition or by other motion pictures making use of parallel situations.” (Citing *Tiffany Productions v. Dewing*, 50 F. (2d) 911; *Metro-Goldwyn-Mayer Dist. Corp. v. Bijou Theater*, 59 F. (2d) 70; *Hutchinson Amusement Co. v. Vitaphone*, 93 F. (2d) 176.)

See also:

Kalem v. Harper Bros., 222 U. S. 55, 32 S. Ct. 55, 56 L. Ed. 92;

Patterson v. Century Productions, Inc., 19 Fed. Supp. 30; affirmed 93 F. (2d) 489; Cert. Den. 303 U. S. 655, 58 S. Ct. 759, 82 L. Ed. 1114.

Herbert A. Howell, formerly Assistant Registrar of Copyrights, in his book on “Copyright Law” published in 1942, expressly states at page 23:

“A photoplay in the literal sense is a play exhibited pictorially whether accompanied by dialogue in ‘sound’ or not; but it is not essential that it be based upon or reproduce an existing dramatic composition. . . . Many so-called ‘shorts,’ a little comedy subject used to fill in between the main features, are deemed photoplays by virtue of the action displayed.”

Appellant Bruckman's contention that "MOVIE CRAZY" does not come within the protection of subdivision (d) of Section 1 and that "MOVIE CRAZY" may "perhaps be regarded as a photograph or series of photographs" under subdivision (a) (App. Bruckman's Op. Br. p. 60), is completely dissipated by the foregoing authorities expressly holding a motion picture—even a "slapstick" comedy short—to be a dramatic work covered by subdivision (d) of Section 1.*

*Excerpts from the Code of Federal Regulations are apparently printed at pages 4-5 of the Appendix to appellant Bruckman's brief for the purpose of implying that the regulations of the Copyright Office exclude "motion picture shows" from the category of "dramatic compositions." Of course the reason the Copyright Office does not permit classification of a "motion picture show" as a dramatic or dramatico-musical composition is that Section 5 specifies thirteen classes of applications for registration, of which classification "(d)" is "dramatic or dramatico-musical compositions"; classification "(l)" is "motion picture photoplays," and classification "(m)" is "motion pictures other than photoplays."

As stated in *Tiffany v. Dewing*, 50 F. (2d) 911:

"There would seem to be no escape from the conclusion that plaintiffs are nevertheless entitled to invoke the protection of Section 1 (d) on the ground that the 'motion picture photoplay' is a 'dramatic work' . . .

"To the contention that since Section 5 has separate classifications for dramatic or dramatico-musical compositions for motion picture photoplays, therefore Section 1 (d) is not to be interpreted as embracing the latter, it is sufficient to point out that the classification of Section 5 is merely for the convenience of the Copyright Office and of applicants for copyrights."

POINT II.

Fifty-seven Consecutive Comedy Scenes Constituting One Thousand Consecutive Feet of Film and 20% of Plaintiff's Entire Feature Length Photoplay Is Protectible Under the Copyright Laws Because It Constitutes a New, Novel and Original Combination of Characters, Scenes and Incidents Arranged in a New Pattern and Sequence.

Both appellants strongly urge that the sequence in question is not protectible under the Copyright Laws because it consists merely of isolated "gags," "stage business," "clowning," and "sleight-of-hand tricks" which constitute "grotesque, hobblehedoy" and which do not contain "a thread of consecutively related events." (App. Bruckman's Op. Br. pp. 52, 58; App. Universal's Op. Br. pp. 1, 20, 21, 23, 33, 42, 48-53.)

We submit that a bare inspection of the sequence in question answers appellant's arguments. Furthermore, after hearing all of the evidence, the Trial Court found as a fact that 57 consecutive scenes (1000 continuous feet of film in the seventh and eighth reels consisting of approximately 20% of plaintiff's motion picture photoplay) had been "knowingly, wilfully and deliberately copied, misappropriated, and plagiarized by defendants," "including characters, characterization, motivation, treatment, action and sequence of action." [Finding VII, Tr. pp. 34, 35.]

The screen "continuities" produced by plaintiff and defendant each reflect 57 separate consecutively numbered scenes in substantially identical sequence which have been copied in almost every detail. [Compare Plaintiff's Ex. 3, copy of the continuity and dialogue of "So's YOUR

UNCLE," Reel 4, pp. 1-9 incl., Scenes 1 to 57 incl., with Plaintiff's Ex. 5, continuity and dialogue of "MOVIE CRAZY," Reel 7, Scenes 22-25, pp. 6-8; Reel 8, Scenes 1-57, pp. 1-10 incl.]

Defendant Universal attempts to minimize the piracy by summarizing the misappropriated material in ten lines. (App. Universal's Op. Br. pp. 4-5.) Appellant Bruckman attempts to minimize the misappropriation by a reduction to thirty-three lines. (App. Bruckman's Op. Br. pp. 9-10.)*

Neither appellant purports to find any similarity in characters, characterization, motivation, or treatment of the various scenes in the sequence, nor any "dramatic quality in the entire material misappropriated." Yet appellant Bruckman reluctantly admits that "in Movie Crazy the routine is built around the idea of embarrassment to Harold" and "from beginning to end Harold is under a cloud, is embarrassed by the incidents that occur, and is in jeopardy of greater embarrassment of being thrown out." (App. Bruckman's Op. Br. p. 16.)**

In both pictures, an elderly dowager has promised to help the young man in his professional career and the events at the dance not only prove embarrassing to the

*Sixteen separate consecutive scenes (Scenes 15-30 Incl., Reel 8) in "MOVIE CRAZY" are dismissed by appellant Bruckman in seventeen words. Many scenes are not even referred to although copied verbatim (*e. g.*, Scenes 50-56, Incl.).

**Isn't there any embarrassment to Steve (the would-be playwright) in defendant's picture "So's YOUR UNCLE"? Isn't Steve in danger of being thrown out because he gets into the magician's coat by mistake and causes pandemonium on the dance floor in precisely the same manner and by the same means and incidents in the same succession and sequence as Harold, the would-be actor, in plaintiff's picture?

young man but appear to be catastrophic to the aid he has been promised. In both pictures the young man is not expected at the dance by the young woman with whom he is in love. In both pictures she comes to the dance escorted by another young man who loves her and despises the hero. In both pictures the sequence at the night club ends with the hero and the girl confessing their love to each other. In both pictures the career of the young hero is not affected adversely by his confusion and embarrassment at the night club and eventually plaintiff's actor gets his long-wanted contract to act and defendant's playwright secures his long-wanted production for his play.

Lloyd's evidence was that "the whole sequence is naturally tied into the story; it is the heart of our story and without that particular sequence tied into it the story is certainly destroyed" [Tr. p. 147]; that the sequence is an "integral and essential part of the story and plot" of "MOVIE CRAZY" and "plays a functional part in the development of the picture" and "is one of the funniest sequences I have ever had in any picture" [Tr. pp. 138-139]; that it was an "outstanding comedy sequence" in his career, and was "the little gold nugget that we searched for to make the picture." [Tr. p. 141.]

Neither appellant has the temerity to argue that the particular succession of 57 scenes (or in fact any *two consecutive scenes*) appearing in the plaintiff's photoplay "MOVIE CRAZY" was ever produced or appeared in any motion picture except plaintiff's own photoplay entitled "WELCOME DANGER" from which it was eliminated after the expenditure of from \$75,000 to \$80,000 [Tr. p. 144]; that "more new material was added in order to adapt the sequence to 'Movie Crazy'"; it "took a great deal of time

to prepare it for this picture.” [Tr. p. 144.] In preparing “MOVIE CRAZY” the plaintiff expended \$63,373.67 in the employment of eleven writers. [See Plaintiff’s Ex. 2, Tr. p. 174.] The total production cost of plaintiff’s picture was \$652,853.86 and it took 21 months to prepare and produce the picture, from October 13, 1930, until July 31, 1932. [Tr. p. 175.] The magician’s coat sequence of 1000 feet in reels 7 and 8 was “probably the most expensive” of the sequences in the picture. [Tr. p. 146.]

If the initial cost of \$75,000 to \$80,000 incurred during the production of “WELCOME DANGER” is added to 20% of the pro rata production cost of “MOVIE CRAZY,” to-wit: \$125,000, *the actual cost to the plaintiff-corporation of preparing and producing the misappropriated sequence was in excess of \$200,000.*

This is the material which appellants claim can be pirated by them with impunity because they say it is “commonplace.”

By a process of dissection appellants contend their evidence shows among other “sources” that a stage magician once played in a vaudeville act “where things used to drop out of his coat” [Tr. p. 321] and that Charlie Chaplin once made a picture where he was an escaped convict and “made a couple of passes as if he were a magician” in taking silverware out of another convict’s pocket. [Tr. pp. 321-322.] However, appellants do not contend that the scenes, incidents, or sequences misappropriated by defendants ever previously appeared in the same combination, arrangement or form devised and created by Lloyd’s large staff of writers. [See Plaintiff’s Ex. 2, Tr. p. 174.]

The genius of Lloyd's ten writers was in taking commonplace materials and weaving a new and original fabric, a different treatment, and an unusual combination of the common things. It is their *new combination* and *novel arrangement* which is protectible under the law, and which the defendants have pirated.

Appellant Bruckman himself conceded on the witness stand that prior to plaintiff's production of "MOVIE CRAZY" he had never seen "that particular combination" of scenes or incidents anywhere before [Tr. p. 94]; and that as far as he knew the "particular sequence of action" was "original." [Tr. p. 95.] The law is clear that a new and original combination of incidents and events is protected by copyright.

13 *Corpus Juris* 1146:

"Originality in dealing with incidents familiar in life or fiction lies in the *association and grouping of those incidents* in such a manner that the work under consideration presents a new conception or a *novel arrangement of events*. The copyright protects this element of originality and *it is an infringement to appropriate a novel combination of old or stock incidents and situations.*"

In *Corelli v. Gray*, 30 L. T. Rep. 116, the defendants contended that they were free to use "stock incidents" but the Court held the combination and association of incidents to be protectible, stating at page 117:

"But the combination of these ordinary materials may nevertheless be original. . . . When it appeared that not merely one, two or three stock incidents had been used but a *combination of stock incidents*, every one of which had been taken from the

plaintiff's book, it would be narrowing the law beyond what was reasonable to say the plaintiff was not entitled to be protected."

In *Dymow v. Bolton*, 11 F. (2d) 690 (2d C. C. A.), the Appellate Court stated:

"If the appropriation complained of is of the '*combination or series of dramatic events* apart from the dialogue which makes up' a particular scene, reference may be had to *Daly v. Webster*, 56 F. 483, 4 C. C. A. 10; *Dam v. Kirk Co.*, 175 Fed. 902, 99 C. C. A. 392, 41 L. R. A. (N. S.) 1002, 20 Ann. Cas. 1183; *Chappell v. Fields*, 210 F. 864, 127 C. C. A. 448. And it will be quite plain that no mere plot or so-called theme was protected by these decisions. They assert the legal proposition that *there may be dramatic compositions in the invention and arrangement of a series of events* although the 'dialogue (coincident with the events) is unimportant and as a work of art trivial.' (56 F. at p. 486, 4 C. C. A. 19.)"

In *Edwards & Deutsch v. Boorman*, 15 F. (2d) 35, the Seventh Circuit Court of Appeals stated:

"*The materials used are all old and in the public domain, but the selection, the ordering, and arrangement are new and useful, and copyrightable.*

"In deciding the question of infringements, the first and most obvious thing to do is to compare the productions themselves. The copyrightable feature of appellant's production being a *particular plan, arrangement, and combination of materials*, the identity of such plan, arrangement and combination of similar materials, found in appellee's production, not only suggests, but establishes the claim of copying."

See also:

Sheldon v. Metro-Goldwyn-Mayer Pictures Corp.,
81 F. (2d) 49, 53, 54;

Italian Book Co. v. Rossi, 27 F. (2d) 1014;

National Institute v. Nutt, 28 F. (2d) 132, 134,
affirmed 31 F. (2d) 236.

Defendants cannot break down and dissect the outstanding sequence in plaintiff's picture for the purpose of persuading this Court that the sequence as a whole is in the public domain. (See Point II B, *post*, pp. 36-43.) There is no suggestion in the evidence that anyone other than plaintiffs' writers ever wrote or produced a similar sequence with similar "arrangements," "adornment," "trimming," or sequence of incidents or action. Even one reel of slapstick comedy which is not related or integrated into a feature length motion picture is protectible by copyright. (*Vitaphone Corp. v. Hutchinson*, 19 Fed. Supp. 359 at 360.) One thousand to 1500 feet of wild animal pictures is protected by copyright. (*Patterson v. Century Productions Inc.*, 19 Fed. Supp. 30, affirmed 93 F. (2d) 489 (2d C. C. A.). Animated cartoons are protected by copyright. (*Corcoran v. Montgomery Ward*, 121 F. (2d) 572 (9th C. C. A.). So-called "comics" such as "THE BAT MAN" are protected. (*Detective Comics Inc. v. Fox Pub.*, 46 Fed. Supp. 872; *Detective Comics Inc. v. Bruns Publications, Inc.*, 111 F. (2d) 432.) A single cartoon character is protected. (*Fleischer Studios Inc. v. Freundlich Inc.*, 5 Fed. Supp. 808, affirmed 73 F. (2d) 276 (2d C. C. A.); Cert. Den. 294 U. S. 717, 55 S. Ct. 516, 79 L. Ed. 1220.

- (A) MISAPPROPRIATION AND COPYING OF A MAJOR SEQUENCE OF A FEATURE LENGTH MOTION PICTURE CONSTITUTES INFRINGEMENT OF A "MATERIAL PORTION" AND A "SUBSTANTIAL PART" OF PLAINTIFF'S COPYRIGHTED WORK. THE WHOLE NEED NOT BE TAKEN IN ORDER TO CONSTITUTE PIRACY.

National Institute v. Nutt, 22 F. (2d) 132 at 135:

"To constitute an invasion of copyright it is not necessary that the whole of a work should be copied, nor even a large portion of it in form or substance, but that, if so much is taken that the value of the original is sensibly diminished, or the labors of the original author are substantially, to an injurious extent, appropriated by another, that is sufficient to constitute an infringement." (Quoting *West Publishing Company v. Thompson*, 169 Fed. 833, at p. 854.)

Ansehl v Puritan (8th C. C. A.), 61 F. (2d) 131 (Cert. Den. 287 U. S. 666, 53 S. Ct. 224, 77 L. Ed. 374):

"A copy of a 'substantial part' constitutes an infringement. It is not necessary that the whole composition be rifled. *Parris v. Hexamer, supra*; *Merriam Co. v. United Dictionary Co.*, 146 Fed. 354 (C. C. A. 7th) (affir'd 208 U. S. 260, 28 S. Ct. 290); *Springer Lithog. Co. v. Falk*, 59 Fed. 707 (C. C. A. 2d); *Meccano v. Wagner*, 234 Fed. 912 (D. C. S. D. Ohio)."

Fendler v. Morosco, 253 N. Y. 281:

"A part, however small, of a work which is appropriated is material where the result of the appropriation is the suggestion or impression of similarity or identity. (See *West v. Francis*, 5 B. & Ald. 737;

Hanfstaengl v. Baines & Co., Ltd. (1895), A. C. 20;
Boosey v. Empire Music Co. Inc., 224 Fed. Rep. 646;
Chicago Record-Herald Co. v. Tribune Assn., 275
Fed. Rep. 797.)”

Harms v. Cohen, 279 Fed. 276:

“That the playing consisted of short excerpts is no defense. (*Folsom v. Marsh*, 2 Story 100, Fed. Cas. No. 4, 901; *Daily v. Palmer*, Fed. Cas. No. 3, 552; *Hein v. Harris* (C. C.), 175 Fed. 875, affirmed 183 Fed. 107, 105 C. C. A. 399; *Boosey v. Empire Music Co.* (D. C.), 224 Fed. 646.)”

Chicago Record-Herald Co. v. Tribune Assn., 275 Fed. 797 at 799:

“Any unauthorized use, copy or appropriation is not to be neutralized on the plea that ‘it was such a little one.’”

See also:

Sheldon v. Metro-Goldwyn-Mayer (2d C. C. A.),
81 F. (2d) 49;

De Acosta v. Brown (2d C. C. A.), 146 F. (2d)
408; Cert Den. 325 U. S. 862, 65 S. Ct. 1198;

King Features Syndicate v. Fleischer (2d C. C.
A.), 299 Fed. 533;

Hartfield v. Peterson (2d C. C. A.), 34 U. S. P. Q.
305, 91 F. (2d) 998;

Hill v. Whalen, 220 Fed. 359.

(B) PURPORTED DISSIMILARITIES, CHANGES, OMISSIONS, ADDITIONS, AND VARIATIONS MADE BY DEFENDANTS WILL NOT EXCUSE, EXONERATE, OR EXCULPATE DELIBERATE INFRINGEMENT.

Confronted with uncontradicted evidence that Universal's writer Bruckman and Universal's producer Yarbrough deliberately copied and misappropriated 20% of plaintiff's motion picture "MOVIE CRAZY" [see Finding VII, Tr. pp. 34, 95-96], appellants nevertheless claim exoneration because this outstanding sequence was colorably imitated by defendants "with different locale, different actors, different characters, different dialogues and different costumes" which defendants contend were used by them "to a different purpose." (App. Bruckman's Op. Br. p. 70.)

Of course the common purpose in both plaintiff's and defendants' picture was comedy, and any observer will see substantially the same sequence of incidents and emotions portrayed on the screen and will feel the same emotional reaction himself as the comedy sequence reaches its common climax in both pictures.

How could defendants in 1943 possibly infringe upon a motion picture photoplay made ten years earlier unless they used "different actors" and "different costumes"? The only difference in locale is that one is a hotel night club and the other is apparently a night club not located in a hotel. Such colorable differences cannot serve to exculpate defendant's piracy.

In *Boosey v. Empire Music Co.*, 224 Fed. 646 at 647, there was only one phrase common to two musical compositions which the Court found were otherwise "consider-

ably different both in theme and execution.” Yet the Court granted an injunction upon the ground that the plaintiff’s copyright had been infringed in only one particular, as to which the Court found “marked similarity.” The Court stated at page 647:

“The composition which plaintiffs own is of a dignified character, has been sung by a distinguished singer, and has as its basic theme a living person standing on the grave of his dead loved one and hearing her voice. The composition owned by defendant is in syncopated time (familiarily known as ragtime), has been sung by a master of that art, and expresses the desire of a negro to go back to his old home in Tennessee. The two compositions are considerably different, both in theme and execution, except as to this phrase, ‘I hear you calling me,’ and, as to that, there is a marked similarity. . . . The ‘I hear you calling me’ has the kind of sentiment in both cases that causes the audiences to listen, applaud, and buy copies in the corridor on the way out of the theater.”

As stated by the Court in *Pellegrini v. Allegrini*, 2 F. (2d) 610:

“. . . There may be any number of differences between the two and yet the finding (of infringement) be unhesitatingly made.”

The fact that defendants may have added or changed plaintiff’s precise mode of expression is not a defense:

Nutt v. National Institute, 31 F. (2d) 236 (2d C. C. A.):

“Copying is not confined to a literal representation but includes various modes in which the matter of

any publication may be adopted, imitated or transferred with more or less colorable alteration.”

King Features Syndicate v. Fleischer, 299 Fed. 533 (2d C. C. A.):

“The disguise of a source from which the material was derived does not defeat the protection of a copyright nor does taking a part of the work constitute an evasion of the copyright. . . . We do not think it avoids the infringement of the copyright to take the substance or idea and produce it through a different medium. . . .”

In *Fleischer Studios Inc. v. Freundlich Inc.*, 73 F. (2d) 276, the Court said the test of infringement is whether the infringing work is “recognizable by an ordinary observer as having been taken from the copyright source. Such is an infringement. . . . Slight difference and variations will not serve as a defense.” (Cert. Den. 294 U. S. 717, 55 S. Ct. 516, 79 L. Ed. 1220.)

See also:

Daly v. Palmer, 6 Fed. Cas. 3552;

Dam v. Kirk LaShelle, 166 Fed. 589, affirmed 175 Fed. 902 (2d C. C. A.);

Maurel v. Smith, 220 Fed. 195;

Sheldon v. Metro-Goldwyn-Mayer, 81 F. (2d) 49;

Barsha v. Metro-Goldwyn-Mayer, 32 Cal. App. (2d) 556, 562.

(C) PUBLIC DOMAIN IS NOT A DEFENSE WHERE THE PRECISE COMBINATION AND ARRANGEMENT OF 57 SCENES IN CONSECUTIVE SEQUENCE NEVER PREVIOUSLY EXISTED IN THE SAME FORM AND COMBINATION AS THAT CREATED AND DEvised BY PLAINTIFF'S WRITERS. IN NO EVENT WOULD DEFENDANT HAVE ANY RIGHT TO COPY SLAVISHLY FROM PLAINTIFF'S WORK.

Both appellants argue that no copyright can protect such common materials as magician's slight-of-hand performances, dancing, changing clothes, etc., regardless of any new or novel use, combination or arrangement of the old materials. Under the heading of "public domain" appellant Bruckman claims that many "ideas" in Lloyd's picture were "commonplace" because "the idea of changing clothes goes back to Aesop's Fable 'The Wolf In Sheep's Clothing,'" and the idea of "'conjuring . . . is familiar to readers of Arabian Nights,'" etc. (Bruckman's Op. Br. p. 17.)

Bruckman himself testified however, that as far as he knew getting into a magician's coat by mistake was original with Lloyd [Tr. p. 95] and even his resourceful counsel does not claim that anything remotely resembling the "magician's coat sequence" of "Movie Crazy" had its counterpart, source, or origin, in Aesop's Fables or the Arabian Nights.

Likewise "magician's acts" may have been witnessed on the vaudeville stage and elsewhere by Bruckman but he frankly admitted on the witness stand that "the particular combination of gags with the particular sequence of action as finally depicted on the screen of Movie Crazy" was, as far as he knew, "original." [Tr. p. 95.]

Since Bruckman does not contend that he himself originated the novel sequence copied by Universal or even that he did any original work or research in connection therewith, the argument of his counsel relating to isolated magician's acts, incidents or gags, previously known to magicians or others, becomes immaterial.

The law is well settled that "slavish copying" of a new and original combination of old materials cannot be justified by a defense of public domain. The latter is available only when the subsequent use of the old materials is the sole result of independent research and original compilation or combination by the subsequent user.

In *Fisher v. Dillingham*, 298 Fed. 145, the defendants contended that the identical material which the plaintiff claimed had been taken from him was in the public domain and that therefore it was (1) not copyrightable and that (2) public domain was an absolute defense. Judge Learned Hand held both contentions untenable, stating at page 146:

"Any subsequent person is, of course, free to use all the works in the public domain as sources for his compositions. No later work, though original, can take that from him. But there is no reason in justice or law why he should not be compelled to resort to the earlier works themselves, or why he should be free to use the composition of another, who himself has not borrowed. If he claims the rights of the public, let him use them; he picks the brains of the copyright owner as much, whether his original composition be old or new. The defendants' concern lest the public should be shut off from the use of works in the public domain is therefore illusory; no one suggests it. That domain is open to all who tread it; not to those who invade the closes of others."

The Second Circuit Court of Appeals more recently disposed of similar contentions urged in connection with an infringement of the copyright upon "Superman" comics stating:

In *Detective Comics, Inc. v. Bruns Publications, Inc.*, 111 F. (2d) 432:

"Defendants attempt to avoid the copyright by the old argument that various attributes of 'Superman' find prototypes or analogues among the heroes of literature and mythology. But if the author of 'Superman' has portrayed a comic Hercules, yet if his production involves more than the presentation of a general type, he may copyright it and say of it: 'A poor thing but mine own.' Perhaps the periodicals of the complainant are foolish rather than comic, but they embody an *original arrangement of incidents* and a pictorial and literary form which preclude the contention that Bruns was not *copying the antics* of 'Superman' portrayed in 'Action Comics.' We think it plain that the defendants have used more than general types and ideas and have appropriated the pictorial and literary details embodied in the complainant's copyrights.

"We have repeatedly held that, irrespective of the sources from which the author of a work may derive the material which he uses, a picture or writing which is his own production cannot be copied. The prior art is only relevant as bearing on the question whether an alleged infringer has copied the author or has taken his material directly from the prior art (Sheldon v. Metro-Goldwyn Pictures Corporation, 2 Cir. 81 F. (2d) 49, 53).

"So far as the pictorial representations and verbal descriptions of 'Superman' are not a mere delineation

of a benevolent Hercules, but embody an *arrangement of incidents* and literary expressions original with the author, they are proper subjects of copyright and susceptible of infringement because of the monopoly afforded by the Act."

See, also:

Stodart v. Mutual Film Corp., 249 Fed. 507:

"The defendants have copied the plaintiff's copyright much more nearly than that which resembles anything which is in the public domain. A man may take an old story and work it over, and if another copies not only what is old but what the author has added to it when he worked it up, the copyright is infringed." (Aff'd 249 Fed. 513.)

See, also:

Holmes v. Hearst, 174 U. S. 82 at p. 86, 19 S. Ct. 606, 43 L. Ed. 904;

Hartfield v. Peterson (2d C. C. A.), 34 U. S. P. Q. 305, 91 F. (2d) 998.

Since defendants cite English cases throughout their briefs we would like to refer to three modern English cases which also hold that public domain is no defense where it is the new combination of old material which has been copied. In *Graves v. Pocket Publications, Ltd.*, 54 T. L. R. 952, reported by E. J. MacGillivray in his collection of (English) Copyright Cases 1938, the plaintiff's copyrighted work consisted of a collection of facts relating to 26 professions and the average earnings therein. It was contended on behalf of the defendants that there was no infringement in taking from a book of this description "a few figures purporting to be based on as-

certainable facts provided that no part of the language was taken.” Nevertheless the court held that a *single page* printed by the defendants constituted an infringement of plaintiff’s copyright upon a 300-page book containing 60 chapters.

Likewise in *Oliver v. Dickens*, decided July 2, 1936, in Chancery, reported at page 53 in MacGillivray’s copyright cases for 1936, the court held a collection of facts relating to mastiff dogs obviously combined materials in the public domain, but held a defendant liable for copyright infringement who used in only one chapter of a later book some of the plaintiff’s arrangement of the old materials instead of going to common sources in the public domain, the court stating:

“Of course, the plaintiff has not a monopoly in the history of the mastiff, nor in the allusions in literature or records in stone to dogs of that breed, nor in the facts relating to the pedigrees of modern mastiff dogs or similar facts. But . . . another person writing a similar history has no right to use the material which the plaintiff has unearthed and chosen to illustrate and adorn his history . . . without having herself gone to the trouble of searching into the common sources and obtaining her subject-matter from them. She has saved herself pains and labour by availing herself of the pains and labour of the plaintiff.”

See, also, *Holland v. Vivian Van Damm Productions, Ltd.*, decided December 7, 1936, in Chancery reported in MacGillivray’s Copyrighted Cases 1936 where a *ballet* was held to have infringed an Oscar Wilde story although the defendants contended that merely “common stock incidents” had been used. (MacGillivray, p. 74.)

For further application of the same principle in the United States, see, also:

Sheldon v. Metro-Goldwyn-Pictures Corp., 81 F. (2d) 49, 53;

Italian Book Co. v. Rossi, 27 F. (2d) 1014;

National Institute v. Nutt, 28 F. (2d) 132, 134, aff'd 31 F. (2d) 236.

(D) THE SEQUENCE OF SCENES MISAPPROPRIATED BY DEFENDANTS DOES NOT CONSIST MERELY OF ISOLATED "GAGS" AND PIECES OF "STAGE BUSINESS" NOR MERE "COMIC ACCRETION." DEFENDANTS' ATTEMPT TO "BRAND" OR "LABEL" PLAINTIFF'S SEQUENCE IS EXTREMELY MISLEADING.

Throughout the briefs filed by both appellants appears their reiterated contention that "gags" and "stage business" are not protected by copyright and that appellants have misappropriated nothing more. This is a very shrewd attempt to confuse the court by misleading terminology, which has been used in a number of different ways by various courts in an entirely different sense and connotation.

So far as the expression "stage business" is concerned, there can be no possible misunderstanding. Stage business consists of gestures or mechanical movements upon the stage which consist of mere details in acting or staging. Such details are so minor in nature that not infrequently they are entirely omitted from a manuscript of a play and are left to the discretion of the actor or stage director (See Webster's Collegiate Dictionary, p.

137, defining “business” in the theater as “the details in acting or in staging a play usually left to the discretion of actors or directors.”)

We have no dispute whatever with the decisions holding “stage business” not to be protected by copyright: lighting a cigarette, moving a chair, jiggling a telephone, changing clothes, etc. Such “pieces of stage business” are not ordinarily capable of monopoly, yet it has been judicially stated that “a nod, a movement of the hand, a pause” *might be so combined with a series of events as to become protectible*. See *Sheldon v. Metro-Goldwyn-Pictures*, 81 F. (2d) 49, where Judge Learned Hand stated at page 56:

“Speech is only a small part of a dramatist’s means of expression; he draws on all the arts and compounds his play from words and gestures and scenery and costume and from the very looks of the actors themselves. Again and again a play may lapse into pantomime at its most poignant and significant moments; a nod, a movement of the hand, a pause, may tell the audience more than words could tell. To be sure, not all this is always copyrighted, *though there is no reason why it may not be, for those decisions do not forbid which hold that mere scenic tricks will not be protected*. (*Serrano v. Jefferson* (C. C.), 33 F. 347; *Barnes v. Miner* (C. C.), 122 F. 480; *Bloom et al. v. Nixon* (C. C.), 125 F. 977.) The play is the sequence of the confluents of all these means, bound together in an inseparable unity; it may often be most effectively pirated by leaving out the speech, for which

a substitute can be found, which keeps the whole dramatic meaning.”*

Judge Learned Hand thus distinguishes some of the very cases relied on by appellants (*Barnes v. Minor* is quoted at page 51 of appellant Universal’s opening brief and is likewise cited, together with *Bloom v. Nixon*, on page 57 of appellant Bruckman’s Opening Brief).**

We now fully realize that appellants’ very astute counsel at the trial repeatedly asked questions of their own witnesses Hirleman, Bruckman and Adler incorporating the phrase “stage business” in an entirely different sense than that which has heretofore been used in decided cases, and for the purpose of disguising and attempting to “label” the material pirated.

Plaintiff’s witnesses, however, at no time described the sequence of 57 scenes misappropriated by defendants as consisting of “stage business” and although every stage play and every moving picture necessarily contains minor

*The same distinction is noted by Weil On Copyright Law, Secs. 185, 186, quoted in *Harold Lloyd Corporation v. Witwer*, 65 F. (2d) 1, where the well-known text-writer describes what is meant by a dramatic composition as follows:

“It may be the creation or representation of a single transaction but *it must repeat or mimic some action, speech, emotion, passion or character, real or imaginary*. When it does, it is the ideas thus expressed which become the subject of copyright. . . . The merely mechanical movements by which effects are produced on the stage are not subjects of copyright where they convey no ideas whose arrangement makes up a dramatic composition.”

**What has heretofore been accepted as within judicial meaning of “stage business” is well illustrated in *Bloom v. Nixon*, 125 Fed. 977, where according to appellant Bruckman, “stage business” consisted of “making one of the audience uncomfortable by singling him out and singing to him.” (App. Bruckman’s Op. Br. p. 57.)

details of acting which can properly be described as stage business, it is the whole original combination of 57 consecutive scenes including character, dialogue and action with which we are here concerned. [See Finding of Fact VII, Tr. p. 34, and Point II, *supra*, pp. 27-44.]

Other favorite phrases repeatedly used by appellants—and with as little accuracy—are “comedy routine,” and “comedy accretion.”

“Routine” is defined in Funk & Wagnall’s Dictionary of the English Language at page 2139 as follows:

“A detailed method of procedure regularly followed; a prescribed course of action gone through day after day or at regularly recurring periods.”

To describe 57 consecutive scenes slavishly copied from a motion picture photoplay consisting of an *admittedly* original sequence containing incidents arranged in an *admittedly* new combination which *admittedly* had never been used prior to plaintiff’s use, is hardly to be characterized as a “procedure regularly followed” or a “prescribed course of action gone through day after day.”

Likewise, if 57 comedy scenes in sequence are to be termed mere “comic accretion” there is no reason why the entire ten-reel comedy should not be similarly characterized. An isolated single comedy scene may perhaps be considered “comic accretion” in a dramatic play or book; but 57 consecutive scenes constituting a major sequence in a photoplay which is itself a comedy, can hardly be classified as mere “comedy accretion.”

Appellants likewise attempt to confuse this Court by reference to decisions holding “sleight-of-hand perform-

because “so far as the words of the two are concerned it is not denied that the similarities are of the most trifling description,” and “the true construction of the act is that the subject matter . . . protected is something which is capable of being printed and published.” (1 K. B. Div. 830.)

In *Karno v. Pathe Freres* (1908), 99 L. T. Rep. N. S. 114, the court followed the same rule that under the old English statutes as they then existed no infringement could be found where there were “no written words” which the actors spoke or were capable of being reduced to writing.

At page 118 the court stated:

“If indeed it could be shown that in the present case there are words capable of being printed or published as a literary piece, then I think it might be held that the cinematographic reproduction is a representation of a substantial part of the whole piece though of course no words are reproduced and *Tate v. Fullbrook* might on that ground be distinguishable on the facts.”

In 1911, however, a new Copyright Act was passed for the express purpose, among others, of affording *protection to British playwrights which had not theretofore been granted*. The new Act was the Copyright Act of 1911 (1 and 2 Geo. 5, c. 46), and in Section 1, sub. 2 it provided:

“For the purposes of this Act ‘copyright’ means the right to produce or reproduce the work . . . to perform the work . . . and shall include the sole right”

(d) In the case of a . . . dramatic work to make any, . . . cinematograph film or other contrivance by means of which the work may be mechanically performed . . . And to authorize any such acts as aforesaid."

In substance the new statute provides for the same protection offered by our Copyright Act of 1909.

In *Falcon v. Famous Players Film Corp.*, 2 K. B. 474, the English Court of Appeals expressly held that such cases as *Karno v. Pathe Freres* were "*no longer law*" (See opinion of Scrutton, Lord Justice, 474, at p. 496):

"In my view the wording of the act of 1911 was intended to enlarge the protection to authors, and to sweep away those decisions by which their rights had been limited, as against the makers of mechanical instruments by which their works could be reproduced. *The decision in Karno v. Pathe Freres is in my opinion no longer law*, and the three American companies in this case are liable for having infringed the plaintiff's performing right."

In view of this and many other current English decisions, we feel it was incumbent upon defendants to advise this Court that the early English decisions cited by them were decided under Copyright Acts no longer in force or effect and completely divergent from the later Copyright Act of 1911 as well as from the present United States Copyright Act of 1909.

The importance of a particular sequence of scenes containing an original combination of “gags” has heretofore been commented on by this Court in *Harold Lloyd Corp. v. Witwer*, 65 F. (2d) 11, at page 16, where the Court said:

“The testimony is that over 100,000 feet of film were taken in connection with the play, only 7,000 feet of which was actually used. It is obvious from such a process that the purpose is not merely to duplicate scenes in the story or to reproduce them; indeed the story is too general in its description for that, but to develop and produce scenes which would carry to the audience the general plan they had in mind. In the production of the gags there was evidently much rephotographing to get the exact es-
*
sequence essential to create a laugh in the audience. *None of these gags and no such sequence is in the story.* Consequently there was no effort to reproduce some such humorous situation in the story, but the purpose was to create a separate distinct sequence in the case of each gag to produce laughter on the part of the audience. It is not contended that these matters were copied from the story; on the contrary, it is admitted that there is a large amount of original material in the play. *There is nowhere any slavish copying of anything in the story of Rodney.*”

The true rule applicable alike in England and the United States today is that if there is “slavish copying” of a unique combination of old materials including gags, characters, scenes, and incidents, the Court will not sustain a technical defense of public domain. (See Point II (C), *supra*, pp. 39-44.)

(E) A MAJOR SEQUENCE OF 57 CONSECUTIVE SCENES DOES NOT CONSTITUTE A "SUB-SECTION OF PLOT" OR "SUBORDINATE SEQUENCE OF EVENTS" IN THE SENSE SUCH TERMS HAVE BEEN USED BY THE COURTS TO DESCRIBE GENERAL THEME OR A SINGLE ISOLATED SCENE.

Appellant Universal implies (Op. Br. p. 53) that the sequence of 57 consecutive scenes, deliberately misappropriated by defendants, falls within the phraseology of the opinion in *Dymow v. Bolton*, 11 F. (2d) 690, in which case the Court expressly said, "We don't believe" there was copying.

The term "subsection of a plot," as used in that opinion, was synonymous with what most courts—and the Trial Court in the *Dymow* case—had described as general "theme"; and the Second Circuit Court of Appeals expressly held in the *Dymow* case that the two plays had in common only an "incomplete skeleton" with "no suggestion" of similarity in even the most general features of background. One plot was "almost wholly" about "Jewish society engaged in the cloak and suit industry"; the other play was about theatrical and "movie life" with "no suggestion of either Jewish social life, or a Jewish business background." The test, as cited by the Court, was not whether the two plays had an "incomplete skeleton" (or theme) but whether "the flesh and blood, the incidental, yet essential, adornment and trimming" were the same. (11 F. (2d) 692.) The Trial Court had stated

that “perhaps unconsciously defendant took the theme” (11 F. (2d) 690); the reviewing Court held the general pattern insufficient; that the test was “ordinary observation” and that “it requires dissection rather than observation to discern any resemblances here.” (11 F. (2d) 692.)

The *Dymow* case is not in point for appellants. Ordinary observation shows immediate and spontaneous recognition in the case at bar that defendants copied 57 consecutive scenes in the same novel arrangement, combination and sequence. That this constitutes infringement of copyright, the Second Court of Appeals expressly reaffirmed in the *Dymow* case, stating (11 F. (2d) 690):

“If the appropriation complained of is of the ‘combination or series of dramatic events apart from the dialogue which makes up’ a particular scene, reference may be had to *Daly v. Webster*, 56 F. 483, 4 C. C. A. 10; *Dam v. Kirk Co.*, 175 F. 902, 99 C. C. A. 392, 41 L. R. A. (N. S.) 1002, 20 Ann. Cas. 1173; *Chappel v. Fields*, 210 F. 864, 127 C. C. A. 448. And it will be quite plain that no mere plot or so-called theme was protected by these decisions. They assert the legal proposition that there may be dramatic composition in the invention and arrangement of a series of events although the ‘dialogue (coincident with the events) is unimportant and as a work of art trivial.’ (56 F. at page 486, 4 C. C. A. 19.)”

It is also important to note the emphasis with which Judge Hough treats the findings of fact in *Dam v. Kirk LaShelle Co.*, 175 Fed. at p. 907, that the defendant had

“deliberately appropriated” the plaintiff’s material (see 11 F. (2d) 690); which is what the defendants concede they did in the instant case.

Nichols v. Universal Pictures Corporation, 45 F. (2d) 119, cited in support of the same proposition, is likewise not in point for appellants. It also was a case in which general theme or plot was similar, but all the details, “the flesh and blood, the incidental, yet essential adornment and trimming” was different. The *Nichols* case is not applicable where 57 consecutive scenes have been “slavishly” copied. As stated by this Court in *Harold Lloyd Corporation v. Witwer*, 65 F. (2d) at p. 16:

“The question of infringement is narrowed to whether . . . there was an intentional or unintentional *appropriation of incidents and sequences and scenes.*”

Appellant Universal (Op. Br. p. 50) and appellant Bruckman (Op. Br. pp. 38-44), both argue that the decision in *Harold Lloyd Corporation v. Witwer*, 65 F. (2d) 1, is “peculiarly applicable” and “squarely in point”; primarily because of certain phraseology quoted by both appellants and hereinafter set forth. The paragraph is fairly quoted by appellant Bruckman (Op. Br. p. 42), and unfairly quoted by appellant Universal [Op. Br. Appendix p. 6]. We quote the paragraph upon which appellants rely (65 F. (2d) 1, p. 27):

“The only thing in the play approximating a duplication of a scene in the story is that in which the

hero argues with the coach in reference to participating the final plays of the football game. In each case there is an argument, but *the scene*, considered independent from the story and the play merely as a scene or a subordinate sequence of events, is utterly commonplace and incapable of copyright monopoly. It is immaterial, therefore, whether or not there is copying." (P. 27.)

It is apparent from a bare reading of the opinion that this Court used the term "subordinate sequence of events" as synonymous with the term "scene" and not in any way as the equivalent of fifty-seven consecutive scenes "slavishly copied" by appellant. As stated by this Court (65 F. (2d) 1, at p. 27):

"Each case must be determined on its own facts."

So far as the Court's discussion can be deemed applicable to the peculiar facts of the instant case, *Harold Lloyd Corporation v. Witwer* is of no help to appellants. The basis of that decision was as follows:

(1) "There is no such similarity as would impress the ordinary observer." (65 F. (2d) at p. 28.)

(2) "We are of the opinion that such similarities as exist . . . are such as require analysis and critical comparison in order to manifest themselves." (65 F. (2d) at p. 28.)

(3) "It is clear that there is no such similarity as overcomes the positive testimony that there was in fact no copying." (65 F. (2d) at p. 28.)

In the instant case the testimony of defendants themselves showed deliberate copying; the similarities require no analysis or critical comparison to manifest themselves; they impress the "ordinary observer" immediately and spontaneously with their exact duplication and reproduction of plaintiff's sequence of scenes.

If, as appellants claim, *Harold Lloyd Corporation v. Witwer* "controls" the case at bar, it compels a decision for plaintiff here. We respectfully refer this Court to the tests laid down by this Court in that case:

A. "The primary question is whether these similarities resulted from copying the story." (65 F. (2d) 1, at p. 4.)

B. ". . . The question of infringement is narrowed to whether or not in the subsequent development of the play there was an intentional or unintentional appropriation of incidents and sequence and scenes" (65 F. (2d) 1, at p. 10.)

Applying the tests stated above, and the "standard of the ordinary observer" to the instant case, we submit that we have here a concession of copying by the defendants themselves and the literal slavish duplication of 57 consecutive scenes which cannot, under any circumstances, be properly designated as a "subordinate sequence" in the sense in which this Court used and applied that term to a single scene in the *Witwer* case.

POINT III.

Where Plaintiff Pleads and Proves Actual Damages by Deliberate Widespread Infringments, the Courts Will Not Require Precise Mathematical Computation but Will Award a Fair and Reasonable Amount Consistent With the Evidence Both Expert and Otherwise. A Deliberate Infringer Cannot Rely Upon Uncertainty in Amount of Damages Caused by His Own Wilful Tort.

Defendants' argument respecting proof of plaintiff's damages is predicated upon three fallacious assumptions:

(1) That proven past success of a dramatic property creates no element of inherent value;

(2) That the owner of personal property may not testify to its value;

(3) That well qualified experts in production and distribution of motion pictures are incompetent to testify as to the value of motion picture properties which have proven outstanding popular successes in the past.

Defendants have so distorted and misrepresented the evidence respecting damages that it becomes necessary for us to restate the evidence and legal propositions applicable thereto.

Plaintiff's complaint pleaded general damages of \$200,000, and special damages of \$200,000 resulting from destruction of then existing rights to reissue, reproduce and remake plaintiff's copyrighted motion picture photoplay. [Complaint, Pars. X, XI; Tr. p. 5.]

As pointed out in the opening brief filed by us upon our cross-appeal (pp. 15-19) plaintiff showed in support

of its claims to general damages that it had invested over \$652,000 in the production of the motion picture, and \$414,010.14 to distribute; that over \$1,400,000 had been received from distribution and nearly \$400,000 net profit realized at the bottom of the depression period; furthermore that the particular sequence misappropriated by defendants had cost the plaintiff corporation approximately \$188,000. (See Opening Brief for cross-appellant Harold Lloyd Corporation, pp. 15-16.)

Plaintiff did not plead nor seek to rely upon "guesses" as to future profits which might be realized from a "new and untried venture," as repeatedly stated and implied by defendants Universal and Bruckman. (See, *e. g.*, Universal's Op. Br. pp. 53-61, 67.) The evidence showed that the infringed picture was a valuable theatrical property and its cost of production and the past profits secured through its release and distribution were certainly proper elements to be considered in determining the damages caused to the plaintiff by defendant's wilful infringements.

The stipulated evidence showed that the infringing picture containing plaintiff's misappropriated property was exhibited in 6636 theaters throughout the United States. [Tr. p. 90.] As we pointed out in our opening brief for cross-appellant Harold Lloyd Corporation, based upon the stipulations entered into at the trial, there was evidence of 30,000 or more infringing performances. (Cross-App. Lloyd Op. Br. p. 16.)

We firmly believe if there were no other evidence before the Court, the judgment for \$40,000 general damages is more than amply sustained by the proof to which we have heretofore adverted. However, plaintiff's case does not rest solely thereon. The evidence of several expert witnesses, abundantly qualified, shows that the values *inherent* in plaintiff's picture, including the re-issue and re-make values, were destroyed by the exhibition of defendant's infringing picture. We have outlined in detail this evidence in cross-appellant Harold Lloyd's Opening Brief, pages 20-24, and will not repeat it here, except to state that Arthur Landau expressly testified that exhibitors would not purchase the motion picture if re-issued or re-made [Tr. p. 258], and Botsford expressly testified that no producer would purchase the re-make or re-issue rights after Universal had used the most important comedy sequence in the picture. [Tr. p. 465.] Inasmuch as Universal Pictures Corporation employed Landau as an expert witness fifteen years ago in copyright litigation and Botsford is one of the outstanding executives in the business, having been Executive Assistant to the President of Paramount for many years and a member of the Editorial Board of Paramount as well as a producer in his own right, and presently general manager of an outstanding agency, the Trial Court was fully justified in accepting the testimony of such qualified experts, that plaintiff had suffered injury and damage.

Applying the law as reflected in the adjudicated cases to the factual situation as found in this record, we strenuously contend that the judgment is not only amply sustained by the evidence but is inadequate.

(A) ALL OF THE AUTHORITIES REFLECT THE WELL ESTABLISHED RULE THAT MERE UNCERTAINTY AS TO THE AMOUNT AND EXTENT OF DAMAGE WILL NOT DEPRIVE THE PLAINTIFF OF SUBSTANTIAL RECOVERY.

As pointed out in 15 *Am. Jur. (Damages)*, Section 23, page 414:

“There is a clear distinction between the measure of proof necessary to establish the fact that the plaintiff has sustained some damage and the measure of proof necessary to enable the jury to fix the amount. Formerly the tendency was to restrict the recovery to such matters as were susceptible as having attached to them an exact pecuniary value, but it is now generally held that the uncertainty which prevents a recovery is the uncertainty as to the fact of damage and *not as to its amount*. . . . All that can be required is that evidence which such certainty as the nature of the particular case may permit lay a foundation which will enable the trier of facts to make a fair and reasonable estimate, and the plaintiff will not be denied a substantial recovery if he has produced the best evidence available and it is sufficient to afford a reasonable basis for estimating his loss.”

To like effect see 25 *Corpus Juris (Damages)*, Section 28, page 493:

“The rule against the recovery of uncertain damages generally has been directed against uncertainty as to cause rather than uncertainty as to measure or extent.”

At page 494:

“In many cases, although substantial damages are established, the amount is, insofar as susceptible to technical admeasurement, either entirely uncertain or extremely difficult of ascertainment; in such cases plaintiff is not denied all right of recovery and the amount is fixed by the court or by the jury in the exercise of a sound discretion under proper instructions from the court. This is particularly true of torts.”

This brief would be unduly extended if we were to cite all cases applying these rules. We will confine ourselves to a few.

In *Sinclair Refining Co. v. Jenkins*, 289 U. S. 689, 53 S. Ct. 736, 77 L. Ed. 1449, Mr. Justice Cardozo, in writing a unanimous opinion for the Supreme Court, pointed out that a patent was a “thing unique” and that the difficulties in proving value and the amount of damages did not relieve an infringer for liability therefor, stating:

“The law will make the best appraisal that it can, summoning to its service whatever aids it can command.” (At p. 697.)

See also:

Palmer v. Conn. Ry. Co., 311 U. S. 544, 61 S. Ct. 379, 85 L. Ed. 336.

In *Zinn v. Ex-Cell-O*, *supra*, the California Supreme Court stated at 24 Cal. (2d) 297:

“One whose wrongful conduct has rendered difficult the ascertainment of the damages cannot escape

liability because the damages cannot be measured with exactness.”

U. S. Frumentum Co. v. Lauhoff, 216 Fed. 610, 617.

In *President etc. v. Kelby*, 147 F. (2d) 465 at p. 476 (Cert. Den. 324 U. S. 866, 65 S. Ct. 916, 89 L. Ed.), the Court said:

“This case is governed by the rule that, where one has committed a wrong which renders impossible the exact ascertainment of damages, the risk of the uncertainty should be thrown upon the wrongdoer instead of upon the injured party. . . . (Story Parchment Co. v. Patterson, 282 U. S. 555, 563, 51 S. Ct. 248, 251, 75 L. Ed. 544.)”

In *John B. Stetson Co. v. Stephen L. Stetson*, 85 F. (2d) 586, 596 (Cert. Den. 299 U. S. 605, 57 S. Ct. 232, 81 L. Ed. 446), the Court, in commenting upon the amount of damages, said:

“That the result be only approximate is not fatal; the wrongdoer should not be permitted to escape because of lack of certainty.”

Even the cases cited by defendants recognize these rules. In *Union Oil Co. of Cal. v. Hunt*, 111 F. (2d) 269 (cited by defendant Universal in its opening brief, p. 53), the Court clearly pointed out this distinction and, following the language quoted by defendant Universal, said at page 277:

“No recovery can be had where it is *uncertain whether plaintiff suffered any damage.*”

In *Horlick's Malted Milk Corp. v. Horlick's, Inc.*, 59 F. (2d) 13, a trade mark case cited by defendant Universal (Op. Br. p. 53), the opinion clearly discloses that the plaintiff and defendant were not in competition; there was no evidence of damages, and plaintiff's own witness testified that they lost no business.

In *Electrical Research Products, Inc., v. Gross*, 125 F. (2d) 912, cited by defendant Universal (Op. Br. p. 54), the Court in its opinion clearly showed a total absence of evidence to show any causation between defendant's act and plaintiff's alleged damage. There was absolutely no showing that plaintiff had suffered damages.

In *Montgomery v. Chicago, B. & Q. R. Co.*, 228 Fed. 616, quoted by defendant Universal (Op. Br. p. 54), the Court held that the complaint did not state a cause of action; there had never been a trial; the facts are completely dissimilar to the case at bar and can afford no comfort to the defendants.

Broadway Photoplay Co. v. Real Film Corp., 225 N. Y. 104, 121 N. Y. 756, cited by defendant Universal (Op. Br. p. 54), was an action for breach of contract to supply the plaintiff with first run feature motion pictures for exhibition at its theatres. Evidence was received as to *what plaintiff had made by way of profits from other pictures produced by other producers*. There was no other evidence in any way tending to show that plaintiff had been damaged, or the returns from the pictures defendant refused to supply plaintiff. The case was reversed because of an erroneous charge to the jury. However, the Court recognized the well established rule when it said:

"The plaintiff was not required to prove its damages to the dollar."

The balance of defendant Universal's cases cited in their opening brief (pp. 55 through 58) deal either with complete lack of evidence to show any damages or have absolutely no bearing on the instant case. Defendant Universal has selected isolated statements from the opinions in the cases they have cited, stripped them of their factual background, and have attempted to use them to distort their actual holding.

In *Muther v. United Show Machinery Co.*, 21 F. (2d) 773 (cited in Universal's Op. Br. p. 58), the Court allowed plaintiff \$241,839 for patent infringement, using as its basis the "reasonable royalty" theory. The Court pointed out that the "particular sum arrived at has to be more or less arbitrarily found on the basis of general evidence" (p. 777), and

"The finding of the master, that a reasonable royalty was half way between the royalty paid by the Atlas Tack Co. and the established royalty for years, while more or less arbitrary, has general evidence to justify it." (At p. 778.)

The opinion clearly demonstrates that the problem confronting the Court was *not* uncertainty as to amount of damages but uncertainty as to whether defendant's acts had caused any damage.

In *Paramount Productions v. Smith*, 91 F. (2d) 863 (9th C. C. A.), this Court affirmed a judgment for \$7,500 damages to plaintiff for deprivation of screen credit by the defendant motion picture corporation when it produced a picture based upon plaintiff's work. The only evidence offered in support of plaintiff's claim was (1) evidence of the purchase price received for another and different story

written by the plaintiff in collaboration with another author, and (2) the writer's testimony that after he had received screen credit for another and different literary work, his salary increased from \$250 per week to \$350 per week at one time, and \$500 for another two-week period "due to the screen credit he had received." (91 F. (2d) 863, 867.)

Defendant motion picture corporation contended in that case, as defendants here contend, that "there is a lack of evidence to support the award of damages in that there was no standard by which damages could be gauged." (91 F. (2d) 863, at p. 866.) It is apparent from the dissenting opinion of Judge Wilbur that this Court fully considered the contention that "the evidence leaves the damages to be determined by the jury by guess and speculation." (91 F. (2d) 863, at p. 870.)

Judge Wilbur, in his dissenting opinion, stressed the fact that the plaintiff could not expect to recover "for loss of profits which he expected to acquire by reason of entering into other contracts which he claims to have been unable to do because of the breach of contract." (91 F. (2d) 870, 871.) Extreme emphasis is placed in the dissenting opinion upon the same cases upon which defendants rely in the case at bar, to wit, *Broadway Photoplay Company v. World Film Corporation*, 225 N. Y. 104, 121 N. E. 756 (cited by defendant Universal, Op. Br. p. 54); *Bernstein v. Meech*, 130 N. Y. 354, 29 N. E. 255 (cited and quoted by defendant Universal, Op. Br. p. 55).

Judge Wilbur expressly stated in his dissenting opinion that "it is clear it would be impossible to measure the value of one story by the amount paid for an entirely different story, even though the author is the same. There

is no basis for comparison, and to permit the jury to determine the value of one play with or without screen credit by evidence of the value of another and entirely dissimilar play would evidently require the jury to enter the domain of speculation.” (91 F. (2d) at p. 870.)

Nevertheless, the majority of this Court upheld the contentions of the plaintiff that “*uncertainty as to the measure or extent of damages is not a defense and that the true rule on uncertainty of damages is that the prohibition is directed against uncertainty as to cause rather than uncertainty as to measure or extent*”; the Court stating at 91 F. (2d) 866: “We do not believe the evidence is subject to a charge of uncertainty.”

It is respectfully submitted that in the case at bar the evidence clearly shows that the plaintiff suffered substantial damage. The fact that plaintiff could not show in exact dollars and cents to what extent he was damaged is immaterial under all of the authorities. Particularly is this true where uncertainty in the amount of damage has been due to *deliberate* misappropriation of plaintiff's property.

In *Sheldon v. Metro-Goldwyn Pictures Corporation*, 106 F. (2d) 45, at page 50, the Second Circuit Court of Appeals refers to the fact that “defendants were not innocent offenders; they deliberately lifted the play,” and stated at page 51:

“In cases where plaintiffs failed to prove their damages exactly, we often make the best estimate

we can even though it is really no more than a guess (Piessonka v. Paramount Company, 2nd Circuit, 102 Fed. (2d) 432, 434), and under the guise of resolving all facts against the defendants we will not deny the one fact that stands undoubted. Procedural duties are devised in aid of truth and their supporting use may defeat their whole purpose, as here it would. . . . We must make an award which by no possibility shall be too small. It is not our best guess that must prevail but a figure which will favor the plaintiffs in every reasonable chance of error.”

Likewise in *Bigelow v. RKO Radio Pictures, Inc.*, 66 S. Ct. Rep. 574, 90 L. Ed. 570 (cited by defendant Universal, Op. Br. p. 61), the United States Supreme Court stated in a portion of the opinion which defendant Universal omits from the center of its quotation (66 S. Ct. Rep. at p. 580):

“Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain. Failure to apply it would mean that the more grievous the wrong done, the less likelihood there would be of a recovery.

“The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created. See *Package Closure Corp. v. Sealright Co.*, 2 Cir., 141 F. 2d 972, 979.

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“The constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done. Difficulty of ascertainment is no longer confused with right of recovery’ for a proven invasion of the plaintiff’s rights. *Story Parchment Co. v. Patterson Parchment Paper Co.*, *supra*, 282 U. S. 565, 51 S. Ct. 251, 75 L. Ed. 544; and see also *Palmer v. Connecticut Railway Co.*, 311 U. S. 544, 559, 61 S. Ct. 379, 384, 85 L. Ed. 336, and cases cited.”

See also:

Gotham Silk Hosiery Company v. Artcraft Silk Hosiery, 147 F. (2d) 209;

American Law Institute Restatement of Torts, Sec. 912, Comment D;

American Law Institute Restatement of Contracts, Par. 33, Comment A;

Story Parchment Co. v. Paterson, 282 U. S. 555, 51 S. Ct. 248, 75 L. Ed. 544;

Dowajiac Manufacturing Company v. Minnesota Moline Plow Company, 235 U. S. 641, 35 S. Ct. 221, 59 L. Ed. 398;

Paramount Productions, Inc., v. Smith (9th Cir.), 91 F. (2d) 863, 866.

(B) IN PLAGIARISM CASES, AS WELL AS ALL OTHER CASES INVOLVING PERSONAL PROPERTY, COURTS HAVE FREQUENTLY AWARDED DAMAGES BASED ON THE PLAINTIFF'S OWN TESTIMONY OF THE VALUE OF THE PROPERTY MISAPPROPRIATED.

The general rule is well established—without conflict—that the owner of personal property may always testify as to its value.

See 22 *Corpus Juris* (Evidence), Section 863, and cases cited. This rule has been followed in the federal courts from early times!

Union Pac. R. Co. v. Lucas, 136 Fed. 374;

Chicago etc. R. Co. v. Ohio City Lbr. Co., 214 Fed. 751;

Baltimore American Ins. Co. v. Pecos Merc. Co., 122 F. (2d) 143;

Sacramento Sub. Fruit Lands Co. v. Soderman, 36 F. (2d) 934 (C. C. A. 9th).

Furthermore, the owner may testify to the value of personal property of an intangible nature such as (1) the value of an advertising scheme (*Brookins v. Natl. Ref. Co.*, 26 Ohio App. 546, 160 N. E. 97), and (2) the value of the good will of a business (*White v. Jones*, 79 App. Div. 373, 79 N. Y. Supp. 583; *Sturtevant v. Dowson*, 110 Ore. 155, 222 Pac. 294).

Literary property is "not distinguishable from any other personal property," it is "governed by the same rules" and "protected by the same process." (*Palmer v. Dewitt*, 47 N. Y. 532 at 538.)

The state courts of California and other states, and the federal courts as well, have applied the same rules to cases involving literary property which pertain to proof of damages in cases involving other forms of personal property.

In *Barsha v. Metro-Goldwyn-Mayer*, 32 Cal. App. (2d) 556, the record on appeal shows that the plaintiffs testified the value of their unpublished manuscript was \$10,000 before its misappropriation by Metro-Goldwyn-Mayer and was worthless afterwards. Defendants' "expert" witnesses testified to the contrary as in the present case. The jury rendered a verdict of \$10,000 predicated solely upon the plaintiff's testimony. The judgment was affirmed by the District Court of Appeal and hearing was denied by the Supreme Court.

In *Yadkoe v. Fields*, 66 Cal. App. (2d) 150, a verdict of \$8,000 was sustained for the misappropriation of a few "gags" in a single radio broadcast. The record on appeal shows that the plaintiffs testified the value of their material to have been \$20,000. The defendants contended upon appeal "that there is no evidence of the value of the use of respondent's material," but the Court said at page 160:

"The evidence of value was contained in the testimony of respondent. Sufficient evidence was presented on behalf of respondent for consideration by the jury of the issues raised by the pleadings: the evidence sustains the judgment."

In *Paramore v. Mack Sennett, Inc.*, 9 F. (2d) 66, the record on appeal reflects evidence by the plaintiff and other witnesses upon the subject of value. The Court said the amount of damage "cannot be determined with

any assurance that it is truly accurate.” Nevertheless, the Court gave plaintiff judgment for \$2,500 for the unauthorized use of a copyrighted poem.

In *Nathan v. King Features Syndicate*, 32 N. Y. Supp. (2d) 519, the plaintiff was George Jean Nathan, a dramatic critic, who agreed to write a bi-weekly article for \$200 per article which was to be published in two daily newspapers, one in New York and one in Chicago. The article was syndicated and sold by the defendant to 12 additional newspapers. Nathan testified as to what he believed “a fair price for his articles” and “a fair price for syndicated articles.” Although with respect to the latter the Court stated that such a “method of approximation still leaves a wide margin between what a publisher can get for his completed product and what he can or will pay to authors,” nevertheless, the Court awarded \$4960 damages, stating at page 521:

“ . . . However labelled plaintiff’s right must be measured not by the benefit or profit to defendant, but by the loss to plaintiff. What that loss is, is far from satisfactorily shown by the evidence, but uncertainty as to the amount is not a ground for refusing any relief at all. *Wakeman v. Wheeler & Wilson Mfg. Co.*, 101 N. Y. 205, 209, 4 N. E. 264, 54 Am. Rep. 676; *Industrial & General Trust Ltd. v. Tod*, 180 N. Y. 215, 73 N. E. 7; *Acunto v. Schmidt-Dauber Co.*, 207 App. Div. 411, 202 N. Y. S. 1; *MacGregor v. Watts*, 254 App. Div. 904, 5 N. Y. S. 2d 525. The trier of the facts (in this case the court without a jury) must make the best approximation it can by considering all the circumstances in a rational and common sense way, even though the result is hardly more than a guess. *MacGregor v. Watts*,

supra; *Pieczonka v. Pullman Co.*, 2 Cir., 102 F. 2d 432, 434; *Sheldon v. Metro-Goldwyn-Mayer Pictures Corp.*, 2 Cir., 106 F. 2d 45, 51.”

In *Southern Express Co. v. Owens*, 146 Ala. 412, 41 So. 752, 8 L. R. A. (N. S.) 369, 119 Am. St. Rep. 41, 9 Ann. Cas. 1143, the plaintiff brought an action to recover the value of a literary manuscript which had taken three years to prepare and which had been lost by the defendant. Plaintiff testified that its value was \$1500. There was no other testimony on this point. A judgment for \$1500 in favor of the plaintiff was affirmed, the Court stating:

“Ordinarily, where property has a market value that can be shown, such value is the criterion by which actual damages for its destruction or loss may be fixed. But it may be that property destroyed or lost has no market value. In such state of the case, while it may be that no rule which will be absolutely certain to do justice between the parties can be laid down, it does not follow from this, nor is it the law, that the plaintiff must be turned out of court with nominal damages merely. Where the article or thing is so unusual in its character that market value cannot be predicated on it, its value, or plaintiff’s damages, must be ascertained in some other rational way, and from such elements as are attainable. . . .

“. . . The plaintiff in the case testified to the value, and his was the only evidence, and we have not been shown that the court erred in its finding as to the value.” (Pp. 755-756.)

In the instant case the testimony of Harold Lloyd as the president of the corporation owning the copyrighted

motion picture was further fortified by the fact that he was abundantly qualified as an expert in this field.

If the evidence of any owner—whether qualified or not—is admissible and competent, then certainly Lloyd's evidence is sufficient of itself to support the judgment and would have justified an award of damages far in excess of that given by the Trial Court. (See Cross-App. Op. Br. pp. 15-24.)

Contrary to defendant Universal's assertion (Op. Br. pp. 64-65) that "the Federal courts have recognized the impossibility of proving actual damages in an action of this nature,"* there are many cases where federal courts have awarded judgments for damages in copyright infringement or kindred matters predicated upon the plaintiff's own evidence.

See, in addition to the cases cited above:

Atlantic Monthly Company v. Post Publishing Company, 27 F. (2d) 556;

Paramount Productions v. Smith, 91 F. (2d) 863, 866 (Cert. Den. 302 U. S. 749, 58 S. Ct. 266, 82 L. Ed. 579);

Detective Comics, Inc., v. Bruns, 28 Fed. Supp. 399, affirmed in 111 F. (2d) 432 (C. C. A. 2).

*The five cases cited by appellant involved profits only; the U. S. Supreme Court stating in *Westermann v. Dispatch Printing Co.*, 249 U. S. 100, 103, 194, that there was "undisputed testimony to the effect that the damage could not be estimated"; and in *Douglas v. Cunningham*, 294 U. S. 207, 208, that "at the close of the trial the petitioners admitted inability to prove actual damages." Such decisions as these, where there was no proof of damage, and the plaintiff conceded inability to prove damage, do not establish a general rule of "impossibility of proving actual damages."

(C) A FORTIORI IS A JUDGMENT FOR DAMAGES SUPPORTED WHERE NOT ONLY THE OWNER OF THE PROPERTY MISAPPROPRIATED BUT FOUR EXPERT WITNESSES HAVE TESTIFIED THAT SUBSTANTIAL PROPERTY RIGHTS AND PRESENT EXISTING INTRINSIC PROPERTY VALUES HAVE BEEN IMPAIRED OR DESTROYED.

Although defendants have contended that expert opinion evidence is inadmissible to show the value of plaintiff's property, and have specified as error the admission of such testimony (Universal's Op. Br. p. 40), they have cited no cases to support their contention. In fact, they themselves used alleged experts in attempting to sustain their position that plaintiff's property had *no* value.

It has been the practice in the courts for many years to use expert witnesses in this type of case and such use is bottomed upon the fundamental and long settled rule that expert opinion testimony is always admissible to prove value of property. As pointed out in 20 *Am. Jur. (Evidence)*, Section 890, pages 747, 748:

"Opinion testimony is indispensable in determining the value of property, for it is evident that a court or jury can hardly determine the value of a house, a lot, a horse or any other property from even the most minute description of it. It is universally recognized that witnesses who are competent to give their opinions as to the value of property may do so when the value of property is an issue to be determined, including its value before and after the injury complained of."

See also 20 *Am. Jur. (Evidence)*, Section 894, pages 751, 752:

“It is universally acknowledged that opinion testimony of qualified witnesses is admissible to prove the value of personal property of all kinds, when such testimony is necessary for a fair determination of its value.”

It can hardly be contended that the instant case was not one where such testimony was peculiarly necessary. Certainly the Trial Court was not qualified to determine such values without extrinsic aid and it so expressly stated. [See Tr. pp. 300-303.] Such evidence has been admitted repeatedly by the courts in cases involving the value of personal property. (*McGowan v. American Pressed Tan Bark Co.*, 121 U. S. 575, 7 S. Ct. 1315, 30 L. Ed. 1027.) It has been applied in cases involving the value of patent and patent rights. (*General Paint Corp. v. Kramer*, 68 F. (2d) 623; *Standard Brands v. Federal Yeast Corp.*, 38 F. (2d) 314.) It has been admitted from earliest times in literary property cases. (*Babcock v. Raymond*, 2 Hilt. (N. Y.) 61.)

Such evidence is admissible to show change in value occasioned by injury. (*Sturm v. Williams Oven Mfg. Co.*, 201 App. Div. 113, 193 N. Y. Supp. 852; *Walker v. Graham*, 233 Ala. 539, 172 So. 655.) As stated by the Third Circuit Court of Appeals in *Gotham Silk Hosiery Company v. Artcraft Silk Hosiery Mills*, 147 F. (2d) 209, at p. 216:

“ . . . For many years courts have permitted the use of expert testimony to ascertain the amount of damages where documentary evidence is lacking.”

The four cases cited by Universal (Op. Br. p. 59) in opposition to this well-settled practice are easily distinguishable.

In *Rude v. Westcott*, 130 U. S. 152, cited by defendant Universal (Op. Br. p. 59) the so-called experts who testified were completely unqualified. In the opinion on the page immediately preceding that containing the portion quoted by Universal, appears the following language:

“One of the principal witnesses stated he had never read the patent, had never seen a drill made like that described, had no experience in the matter of licenses, and that he placed his estimate of the value of the claim patented at what he considered would be a fair recompense to the inventor” (at p. 166).

In the *Rude* case plaintiff's so-called experts were not such and obviously were unqualified to testify.

In *Fried, Krupp, Aktien-Gesellschaft v. Midvale Steel Co.*, 191 Fed. 588, the language quoted by defendant Universal (Op. Br. p. 59) had reference to the question of patent infringement as distinguished from damages. In that case plaintiff attempted to show infringement of its patent by expert opinion evidence in the face of witnesses who observed the process and testified as to what they saw and how the result was obtained. The actual facts testified to by eye-witnesses showed no infringement. *The question of damages was never discussed by the court.*

In *Chicago Life Ins. Co. v. Tiernan*, 263 Fed. 325, cited by defendant Universal (Op. Br. p. 59), the plaintiff brought an action for breach of a contract of employment. He had been employed by an insurance company.

The insurance company had been recently incorporated, was in poor financial condition, and had been the subject of notoriety because of a number of lawsuits arising out of improper management. In fact it had finally sold its assets to a third party which ceased conducting an insurance business. The language quoted by Universal in its brief (Op. Br. p. 59) had reference to alleged anticipated future profits of the defendant insurance company and was based upon alleged expert testimony concerning the rate of renewal of policies in sound, established companies—which the defendant was not.

Wakeman v. Wheeler & Wilson Mfg. Co., 101 N. Y. 205, likewise cited by Universal (Op. Br. p. 59) needs little comment. Its complete dissimilarity to the case at bar is found in the very language quoted by defendant Universal.

Universal's attempt to utilize these four cases to overcome the well established rules permitting expert testimony must fail.

In *Sheldon v. Metro-Goldwyn Pictures Corporation*, 106 F. (2d) 45, the court permitted expert testimony from both producers and exhibitors of motion pictures respecting the value of the copyrighted material misappropriated by the defendant picture corporation, and the Second Circuit Court of Appeals said with respect to such evidence (106 F. (2d) at p. 50):

“Men often make quantitative judgments and act upon them in matters which logically admit of them as little as this. If one says that he likes one kind of music twice as much as another, we do not charge him with talking nonsense. We should indeed do so, if he added that his liking for Wagner was ten percent of his liking for Beethoven; but even then

it would express, however pedantically, a different degree of preference from the first form, and it might well have different practical consequences. A court is justified in basing its decrees upon practices common in other human affairs."

In holding that the testimony of experts, even if only "estimates," were approximations entitled to weight and sufficient to sustain a judgment, the Second Circuit Court of Appeal stated (106 F. (2d) at p. 51):

"We are aware that out of all this no real standard emerges, and that it would be absurd to treat the estimates of the experts as being more than expressions of very decided opinions that the play should count for very little. But we are resolved to avoid the one certainly unjust course of giving the plaintiffs everything, because the defendants cannot with certainty compute their own share. In cases where plaintiffs fail to prove their damages exactly, we often make the best estimate we can, even though it is really no more than a guess (*Pieczonka v. Pullman Co.*, 2 Cir., 102 F. (2d) 432, 434), and under the guise of resolving all doubts against the defendants we will not deny the one fact stands undoubted. Procedural duties are devised in aid of truth; and their unsparing use may defeat their whole purpose, as here it would. However, though we do not press the burden of proof so far, the defendants must be content to accept much of the embarrassment resulting from mingling the plaintiffs' property with their own. We will not accept the experts' testimony at its face value; we must make an award which by no possibility shall be too small. It is not our best guess that must prevail, but a figure which will favor the plaintiffs in every reasonable chance of error."

This decision of the Second Circuit Court of Appeals was affirmed by the United States Supreme Court in *Sheldon, et al. v. Metro-Goldwyn Pictures Corporation, et al.*, 309 U. S. 390, 69 Supreme Court Reporter 68, where that Court commented upon the evidence of the experts and expressly held their evidence necessary and competent to prove the value of plaintiff's misappropriated literary and dramatic material, the Court stating, 309 U. S. 390, at p. 408:

“By virtue of an extensive experience, they had an intimate knowledge of all pertinent facts relating to the production and exhibition of motion pictures. Nor can we say that the testimony afforded no basis for a finding. What we said in the *Dowagiac* case is equally true here—that what is required is not mathematical exactness but only a reasonable approximation. That, after all, is a matter of judgment and the testimony of those who are informed by observation and experience may be not only helpful but, as we have said, may be indispensable . . . We see no greater difficulty in the admission and use of expert testimony in such a case than in the countless cases involving values of property rights in which such testimony often forms the sole basis for decision.”

The evidence is uncontradicted that the plaintiff's motion picture “*Movie Crazy*” had been an outstanding success throughout the world and had realized more than \$400,000 profits at the bottom of a world depression. Where a literary or dramatic property has acquired world-wide success, it has developed inherent and intrinsic value which is neither “speculative” nor “conjectural” nor contingent upon possible future profits; but such present

value is based upon its past performances, its previous profits earned, its wide-spread popularity and favorable reputation. In these respects it differs not at all from any other form of real or personal property. Any buyer or seller of any type of property will consider potential future profit as one of the elements entering into the transaction, and any buyer, owner or seller is naturally concerned with what a property will return from sale or use.

As pointed out in *Agency of Canadian Car & Foundry Co. v. Penn Iron Works Co.*, 256 Fed. 339, even market value of property (where property has a market value) is based upon elements of cost plus a reasonable profit, and sound economic logic substantiates such a holding.

It is quite true that expert Botsford testified that Paramount would not reissue a picture unless it could make \$100,000 profit [Tr. p. 462] and when Lloyd was called as defendant Universal's own expert witness (see Point IV, *post*, pages 93 to 98) he testified that if he remade "Movie Crazy" he might make a profit of \$400,000 or \$500,000. Neither of plaintiff's experts Landau or Bentel estimated profits in any amount from either reissue or remake of plaintiff's picture and there is nothing in the evidence of these witnesses—and little in the evidence of Botsford and Lloyd—to justify appellant Universal's repeated implications that *all* of the testimony of all of plaintiff's experts was wholly predicated upon speculations and conjectures as to future profits and not at all upon the past performances, past profits, proven comedy values, and world-wide reputation and popularity of plaintiff's copyright. "By virtue of the extensive experience" of plaintiff's four expert witnesses, their testimony as busi-

ness men well informed as to values placed by the motion picture industry upon its own properties, may not have absolute "mathematical exactness" but certainly constitutes "a reasonable approximation" which is all that is required. (*Sheldon, et al. v. Metro-Goldwyn Pictures Corp., et al.*, 309 U. S. 390, 408.

(D) DEFENDANT'S CASES RESPECTING MARKET VALUE ARE NOT IN POINT. INTRINSIC VALUE OF PROPERTY MAY ALWAYS BE SHOWN WHERE MARKET VALUE DOES NOT EXIST.

We have no quarrel with the rules set forth in *Musser v. Magone*, 155 U. S. 240, concerning the definition of market value. The *Musser* case was not concerned with whether or not the personal property in question had a market value—that was conceded. The sole question was what that market value was, the case involving importations of foreign goods.

Walter v. Duffy, 287 Fed. 41, likewise cited by defendant Universal (Op. Br. p. 62), clearly points out the long and well established rule which hereafter will be referred to, that where there is no market value as evidenced by sales, evidence of intrinsic value of property is always admissible.

In the *Walter* case involving income tax, the sole question was "what was the fair market price or value" of shares of stock in an insurance company? There had been a few actual sales on the open market but the evidence showed that such sales had been brought about through haggling and bargaining. The court stated in discussing this question:

"Evidence of intrinsic value is not resorted to when fair market value is evidenced by sales. But

the difficulty here is not with the principle, as stated in the charge, but with its application to the peculiar facts of this case." (At p. 44.)

The court further clearly pointed out that where no market price exists, resort must be had to "fair value" of the property involved.

In reversing the judgment on an appeal by the tax payer, the court said:

"It was error not to admit proof of the circumstances under which the sales were made and evidence tending to establish the *intrinsic value* of the stock." (At p. 48.)

The well settled rule with respect to determining damages for injury or destruction of personal property is set forth in 15 Am. Jur. (Damages), Sec. 122, pp. 530-531, where the authors point out that generally, value of personal property is based on market value but where there is no market value in its legal sense, recovery is based on its actual value or as in the case of unique properties, upon its value to the owner. In the latter case the rule is stated as follows in 15 Am. Jur. (Damages), Sec. 125, pp. 534-535:

"The fact that personal property which is injured or destroyed by the wrongful or negligent act of another, has no market value, does not restrict the recovery to nominal damages only; its value or the plaintiff's damages must be ascertained in some other rational way and from such elements as are attainable. In such case the proper measure of damages is generally its actual value or its value to the owner. The value of an article may be shown by proof of such elements or facts as may exist—such as its cost,

the cost of reproducing or replacing it, its utility and use . . .”

No better illustration of the use of these rules is available than *Sinclair Ref. Co. v. Jenkins*, 289 U. S. 689 (previously cited) where the court said:

“This is not a case where the recovery can be measured at the current price of a market. The patent is a thing unique. There can be no contemporaneous sale to express the market value of an invention that derives from its novelty, its patentable quality. (Citations.) But the absence of market value does not mean that the offender shall go quit of liability altogether. The law will make the best appraisal that it can, summoning to its service whatever aid it can command. (Citations.) At times the only evidence available may be that supplied by testimony of experts . . .”

And again at page 699:

“Formulas of measurement declared *alio intuitu* may be misleading if wrested from their setting and applied to new conditions. (See e. g., *Standard Oil Co. v. So. Pac. Co.*, 268 U. S. 146, 155:

“The market test failing, there must be reference to the values inherent in the thing itself, whether for use or for exchange (*Industrial Gen. & Trust Co. v. Tod*, *supra*).”

In *Standard Oil Co. v. So. Pac. Co.*, 268 U. S. 146, 45 S. Ct. 465, 69 L. Ed. 890, cited with approval in *Sinclair Ref Co. v. Jenkins*, the Supreme Court recognized the well established rule, stating:

“Where there is no market value such as is established by contemporaneous sale of like property in

the way of ordinary business, as in the case of merchandise bought and sold in the market, other evidence is resorted to. The value of the vessel lost properly may be taken to be the sum which, considering all the circumstances, probably could have been obtained for her on the date of the collision . . . The ascertainment of value is not controlled by artificial rules. It is not a matter of formulas, but there must be a reasonable judgment having its basis in a proper consideration of all relevant facts" (pp. 155-156).

In the *Standard Oil Co.* case expert opinion evidence was admitted to show value of the property in question.

In *Agency of Canadian Car & Foundry Co. v. Penn. Iron Works Co.*, 256 Fed. 339, the court was dealing with the question of the value of unfinished shrapnel shells. It pointed out that the owner was entitled to the value of the shells and that this value of necessity was based upon the cost to produce plus a fair profit and that the value of a commodity having a market value includes profit as well as cost. It further expressly held that where, as there, no market value was available, still the plaintiff was not restricted to nominal damages.

See, also:

Weed v. Lyons Pet., 294 Fed. 725, aff'd 300 Fed. 1005;

Austin v. Millsbaugh & Co., 90 Miss. 354, 43 So. 305.

In *Jacksonville T. & K. W. Ry. Co. v. Peninsular Land etc. Co.*, 27 Fla. 1, 57, 9 So. 661, 689, the action involved the loss of real and personal property and the question of the extent of plaintiff's damages was involved.

In answer to a contention similar to that advanced by the defendants here, the court said:

“We think it would have been a very harsh rule in a case like this to have confined the plaintiff to proof of the market value . . . In the absence of proof that . . . there was a market value for such property.” (At p. 680 of 9 So.)

The court clearly pointed out that where the property in question had no market value in its legal sense, plaintiff was entitled to prove its value “and to establish value in such cases the opinions of witnesses acquainted with the standard of value of such properties are properly admissible” (at p. 680).

And again:

“Property may have a value for which the owner may recover if it be destroyed although it have no market value” (at p. 684).

These well established rules have been followed in this circuit. (*Feather River Lbr. Co. v. U. S.*, 30 F. (2d) 642 (C. C. A. 9.)

(E) APPELLANTS ERR IN CONTENDING THAT THE DAMAGES FOUND BY THE COURT TO HAVE BEEN SUFFERED BY PLAINTIFF FROM UNIVERSAL'S INFRINGEMENTS WERE RENDERED UNCERTAIN BY REASON OF COLUMBIA'S INFRINGEMENTS.

The trial court expressly found

“that by reason of said infringements by defendants and each of them upon plaintiff's copyright the court finds that plaintiff has been damaged by defendants and each of them in the sum of \$40,000” [Par IX, Tr. p. 35].

Appellant Bruckman states that the foregoing finding “must fall because it cannot be ascertained from the record whether the damage, if any, resulted from Universal's photoplay ‘So's Your Uncle’ or from Columbia's picture ‘Loco Boy Makes Good’ ” (Bruckman's Op. Br. p. 68). Appellant Universal states that

“the court failed to find the extent to which the use of the same material in the Columbia picture damaged plaintiff.” (Universal Op. Br. p. 70.)

Both appellants ignore the fact that the finding of \$40,000 is expressly restricted to the infringements by defendant Universal and defendant Bruckman in the Universal picture “So's Your Uncle.” Each and all of plaintiff's witnesses testified in substance that the Columbia “short” had not affected the value of plaintiff's “feature” motion picture because the pictures were not of the same class or character. Most of plaintiff's witnesses were asked upon *cross-examination* by the defendants or the court as to the damage done by Columbia and their answers were in accord that such damage was nil or

negligible. [Lloyd, Tr. p. 156; Landau, Tr. pp. 400, 404, 405; Bentel, Tr. pp. 409, 410; Botsford, Tr. pp. 464, 465.]*

Arthur Landau testified there was a custom and practice in the moving picture industry to require exhibitors to purchase bad comedy shorts in order to secure good feature pictures from the same producing company but that exhibitors frequently did not show the two-reel comedies for evening performances either because they were bad or for other reasons. [Tr. pp. 402-405.]

On the other hand the defendants offered no evidence that the damages found by the court to have been suffered by plaintiff from Universal's infringements were due in fact to Columbia's infringements. In fact the defendants took the position that plaintiff had not been damaged by

*Lloyd testified [Tr. pp. 374, 375]:

" . . . My opinion is that a short does not compete with a feature picture. In the first place, a great many times shorts are purchased by the theatres but are not always shown. Many, many times—a great many times in the evening they haven't time to show them. Sometimes they are purchased and never show them. Another thing, in this particular short the comedy is done so broadly and so unbelievably bad and it is in such a hodge-podge of comedy sequence that I cannot possibly see how that could do anything but very minor damage and certainly not keep us from remaking or reissuing a picture.

Q. In your opinion, then, the circulation of the Columbia short during the years 1942 and 1943 did not impair the value of the reissue rights or remake rights of your motion picture, is that correct? A. That is correct."

either Columbia *or* Universal's infringements because plaintiff had no property of any value at all.

The whole point about the lack of a specific finding as to the exact amount of damage done by Columbia is just another "red herring." No such issue was raised by the pleadings and no such finding is required except in an action between Columbia and Lloyd.

In the instant action, the court gave the defendants the benefit of every doubt when it stated that the evidence respecting Columbia's infringements had "minimized the actual damage," sustained through the Universal infringements. [Tr. p. 521.] Defendants are hardly in a position to now complain that had it not been for Columbia's infringements, the court would unquestionably have found the damages sustained by plaintiff through Universal's infringements to have been much more than \$40,000.

We point out that in the instant case four experts testified plaintiff's damage resulted from Universal's infringements and *no witness testified to the contrary*.

Courts have heretofore commented upon an attempt by defendants, as in the instant case, to invoke another's wrongdoing as a defense, but to no avail. (See *Great A. & P. Tea Co. v. A. & P. Radio Stores*, 20 Fed Supp. 703 at 706.)

(F) DEFENDANTS ERR IN CONTENDING THAT PLAINTIFF'S ACTUAL DAMAGES "SHOULD NOT EXCEED THE SUM OF \$5,000." IT IS UNTRUE THAT DEFENDANT UNIVERSAL "ESTABLISHED THAT IT WAS NOT AWARE THAT IT WAS INFRINGING" AND THAT ITS INFRINGEMENTS "COULD NOT HAVE BEEN REASONABLY FORESEEN." DEFENDANT UNIVERSAL IS FULLY CHARGEABLE WITH KNOWLEDGE AND NOTICE OF MATTERS KNOWN TO ITS AGENTS AND EMPLOYEES WHILE ACTING WITHIN THE COURSE AND SCOPE OF THEIR AGENCY AND EMPLOYMENT.

Appellant Universal contends that plaintiff's actual damages "should not exceed the sum of \$5,000" because defendant Universal "established that it was not aware that it was infringing and that such infringement could not have been reasonably foreseen." (Op. Br. p. 66.)

Appellant Universal deliberately omits to direct the attention of this court to the fact that the trial court *expressly* found contrary to this contention. See Finding VIII, [Tr. p. 35], where the Trial Court expressly found:

" . . . that defendants and each of them at all times were fully informed and had full knowledge that they were infringing upon plaintiff's copyright and the court further finds that the defendant Universal Pictures Company, Inc. could and should have reasonably foreseen said infringements upon plaintiff's copyright."

This finding is abundantly supported by the uncontradicted evidence that at all times during the production of the infringing motion picture Universal's writer Bruckman and Universal's producer Yarbrough were fully informed and had full knowledge that the infringing sequence was "suggested by and patterned after" the Harold Lloyd picture "Movie Crazy." [Tr. pp. 95-96.] In view of this evidence appellant Universal is completely in error in claiming that it "established that it was not aware it was infringing and that such infringement could not have been reasonably foreseen." (Br. p. 66.) Defendant Universal is fully chargeable with knowledge and notice of matters known to its agents and employees while acting within the course and scope of their agency and employment (*Fletcher Cyclopedic of the Law of Private Corporations*, Vol. 4, Chap. 42, Par. 2215, p. 3430; *Christian v. American Druggist Syndicate*, 285 Fed. 359 (C. C. A. 2); *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 12 S. Ct. 239, 35 L. Ed. 1063; *Curtis Co v. U. S.* 262 U. S. 215, 222, 43 S. Ct. 570, 67 L. Ed 956; *Schneider v. Thompson*, 58 F. (2d) 94, 96; *Shapiro & Bernstein Co. v. Velten*, 47 Fed. Supp. 648; *Sheldon v. Metro-Goldwyn Pictures Corp., et al.*, 106 F. (2d) 45, 50, 309 U. S. 390, 397.)

The section of the Copyright Act quoted by appellant Universal (Br. p. 66) omits the first portion of Section 25(b) which provides no limitation whatever upon the amount of actual damages "as well as" actual profits re-

sulting from the infringement, but is very plain in its requirements that an infringer shall be liable:

“(b) To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement as well as all the profits which the infringer shall have made from such infringement . . .”

The statute then further provides for the award of so-called statutory damages which may be awarded by the court “in lieu of actual damages and profits”; which *statutory* damages are subject to the limitation of \$5,000 *only* “where the infringer shall show that he was not aware that he was infringing and that such infringement could not have been reasonably foreseen.” This limitation is applicable, however, only where each and all of the following elements are present:

1. Where no actual damages or profits have been proven; and
2. Where the infringer proves that he was “not aware that he was infringing a copyright work”; and
3. Where the infringer proves that “such infringement could not have been reasonably foreseen.”

None of these elements are present in the case at bar and the trial court expressly found that the defendants were fully aware and had “full knowledge” that they were infringing upon plaintiff’s copyright and that defendant Universal “should have reasonably foreseen said infringements.” [Tr. p. 35.]

POINT IV.

The Court Did Not Err in Sustaining Objections to Improper and Argumentative Questions Asked Lloyd and Incompetent Questions Asked Hirli-man.

(A) The Court Properly Sustained Objections to Argumentative and Improper Questions Propounded by Defendants to Harold Lloyd Whom They Called as Their Own Expert Witness and Stipulated They Would be Bound By His Testimony.

Appellant Universal claims error by the Trial Court in excluding testimony purporting to impeach Harold Lloyd whom defendants had called as their own witness. (Br. p. 69.) As usual, defendant Universal distorts by failing to state the actual picture of what happened at the trial.

On Sept. 13, 1945, defendants rested on the issue of liability. [Tr. p. 340.] The Court agreed to permit certain additional evidence consisting of "not more than two experts" to testify at a subsequent date on the issue of damages. [Tr. p. 345.] When the case was called two months later, Nov. 16, 1945, the defendant Universal called Harold Lloyd "as a witness by and on behalf of the defendants." [Tr. p. 350.] Lloyd was expressly called as the "*defendant's* expert witness, not the plaintiff's, and *defendant's* counsel *stipulated* that Lloyd was their witness and that they would be bound by his testimony:

"The Court: With that assurance I am going to let you proceed with the question but *it is understood that this witness* is your witness and *you* will be bound by his testimony.

Mr. Abeles: *That is correct, sir.*" [Tr. p. 352.]

Subsequently when defendant's counsel did not like Lloyd's testimony as to the high value of reissue rights of his "silent" pictures such as "GRANDMA'S BOY" and "GIRL SHY" (if revamped, narrated and scored like Charlie Chaplin's "GOLD RUSH") and his later "talking" motion pictures such as "MILKY WAY" and "MOVIE CRAZY," Universal's counsel, Mr. Abeles, decided he did not wish to be bound by his previous stipulation and the following colloquy took place:

"Mr. Abeles: I respectfully submit he is not my witness.

The Court: Yes, he is. You called him as your witness. He was excused and I told you this case was continued for a specific purpose, that is, to hear two experts on each side, and you issued a subpoena for this man and brought him into court. I told you in my chambers this morning that I would permit you to use him only as your own witness and when you called him you called him as your own witness."
[Tr. p. 366.]

When defendant Universal claims error on the part of the Trial Court in refusing to permit them to impeach a witness called by them as their own witness under the circumstances disclosed by the record and under a *stipulation* that they would be bound by his testimony, we submit they are wilfully and deliberately attempting to confuse the issue and avoid the consequences of their own conduct.

Strangely enough, in *Harold Lloyd Corporation v. Witwer*, 65 F. (2d) 1, so strongly relied upon by both appellants, virtually the same situation arose when Harold Lloyd and other officers of the Harold Lloyd Corporation

were called by the adverse party who claimed a right to impeach these witnesses whom they had called as their own. In no uncertain terms this Court said, 65 F. (2d) at p. 5:

“The fact that the appellee may have called these witnesses under a mistaken belief . . . cannot change the rule that appellee thereby vouched for their credibility.”

This Court expressly held that under the circumstances disclosed, the adverse party was “estopped to claim that the witnesses are unworthy of credit by reason of having called them as his own witnesses.” (65 F. (2d) at p. 5.)

Furthermore the two questions which defendant’s counsel asked Lloyd were both highly improper, even if they had *not* called him as their own witness. The first question was highly argumentative and was objected to upon that ground and the objection sustained. [Tr. p. 364.] The witness had testified that comedies such as Chaplin’s “GOLD RUSH” had been reissued and could be remade and whether or not other comedies had been reissued or remade was “beside the point.” Counsel for defendant then indignantly commenced his argument with the witness:

“Q. That is beside the point? Well, in all these years if one single picture has ever been remade of that nature, that is beside the point, is that right?

Mr. Fendler: Objected to as argumentative.

The Court: Yes, it is argumentative, counsel. I am not going to permit you to impeach your own witness as you go along.” [Tr. p. 364.]

The second question which the Court refused to permit defendant's counsel to ask was one concerning a *statement in a brief* in an action brought against Lloyd by Sadie Witwer (misprinted Witworth) fifteen years previously. [See Tr. p. 365.] Obviously a brief prepared by an attorney in another lawsuit tried fifteen years earlier was incompetent and completely beyond the limited scope of examination to which defendant's counsel had restricted himself by his agreement to be bound by Lloyd's testimony. [Tr. p. 352.]

It should furthermore be noted that the question was in effect merely another argument with the witness and defendant's counsel had previously been repeatedly cautioned by the Court against twisting the witness's answers [Tr. p. 361]; invading the province of the Court [Tr. p. 360]; and arguing with the witness [Tr. p. 358].

(B) The Court Properly Excluded Hirliman's Proposed Testimony That Thirteen Years Prior to Trial, He Had Personally Purchased Reissue Rights in an Old SILENT Lloyd Picture Entitled "GIRL SHY." Such Testimony Was Incompetent for All Purposes; It Did Not Contradict Lloyd, and It Could Not Establish the Value of Reissue Rights in a TALKING picture in 1945.

Defendant Universal complains that it was not permitted to offer evidence through its witness Hirliman "that he had purchased the reissue rights to one of plaintiff's pictures for only \$3500." (Universal's Op. Br. p. 70.) What Universal fails to state to the Court at any of the three places where the same statement appears in its brief (Universal's Op. Br. pp. 30, 31, 70) is that the motion picture in question was not a *talking* picture but was a *silent* picture, the reissue rights of which Hirliman

purchased "in either 1932 or 1933" [Tr. p. 429] long after the advent of talking pictures. Of course no ordinary exhibitor of talking pictures would purchase or accept silent pictures after his theater had once been "wired for sound" and the public had finally accepted talking pictures in place of silent pictures. Lloyd himself pointed out the necessity of revamping any silent picture in order to make it marketable.

"Naturally you have to embellish it today. You would have to narrate it to a certain extent. You would have to score it. That would naturally depend on how well you did that and who did it. I think I could do it and it would probably be very valuable.

Q. And would the same apply to the picture 'Safety Last'? A. I would say it would, yes." [Tr. p. 352.]

It is obvious that appellant Universal is attempting to take a very unfair advantage of its own concealment of material facts, when it contends that Hirliman's proposed testimony that he paid a third party (Pathe Exchange) \$3500 for the reissue rights of a *silent* motion picture in 1932, was relevant or competent or could have any probative force in a determination as to whether a *talking* motion picture had reissue value in 1945 (in which no revamping, narrating or scoring would be necessary).

Furthermore defendant Universal had contended from the commencement of the trial that the value of other *talking* pictures reissued and remade by other producers (particularly including the Harold Lloyd talking motion picture entitled "MOVIE CRAZY") was improper and incompetent and objections by defendants had been repeatedly sustained by the Court. [Tr. pp. 107-111.] In

other words, defendant Universal contends that one rule of evidence should be applicable to the plaintiff and all plaintiff's evidence respecting the 1945 value of comparable talking pictures should be excluded; but another rule of evidence should be applicable to the defendant Universal which should be permitted to offer evidence respecting the value of an incomparable silent picture purchased thirteen years prior to trial.

Appellant Universal's only other contention with respect to the admissibility of Hirlihan's evidence is that it was "in contradiction of Lloyd's prior testimony." (App. Universal's Op. Br. p. 70.) This also is a complete misstatement of the record and is based upon the additional flat misstatement that "Lloyd had testified that the reissue rights had never been sold, licensed or disposed of to any of his pictures." (Universal's Op. Br. p. 29.) The fact is that Lloyd testified "I haven't had them up for sale" [Tr. p. 354] but *Paramount* sold the remake rights of "'MILKY WAY' to Goldwyn" [Tr. p. 136], and Hirlihan's offered testimony was that he had purchased the remake rights in the silent picture "GIRL SHY" from Pathe [Tr. p. 429]. There is no inconsistency in Lloyd's testimony. Even if Lloyd's testimony was inconsistent it would be on a wholly collateral matter, to-wit: the value of reissue rights in *silent* pictures is not an issue in this lawsuit.

And in any event appellant Universal is precluded from attacking or attempting to impeach the witness whom they called and stipulated they would be bound by his testimony. See Point IV (A), *supra*: *Harold Lloyd Corporation v. Witwer*, 65 F. (2d) 1, at p. 5, is conclusive against defendants on this point.)

POINT V.

Defendant Universal's Attempt to Invoke the Doctrines of Laches and Estoppel for the First Time on Appeal Must Fail.

(A) The Evidence Shows No Laches and in No Event Is the Doctrine Applicable to an Action at Law for Damages.

Defendant Universal's attempt to shield itself from its intentional infringement of plaintiff's copyright by taking purported shelter under the doctrine of laches, is typical of its continuous efforts to avoid the effect of its wilful acts by raising completely untenable contentions.

The alleged defense of laches was never pleaded by defendants; it was not an issue in the Trial Court; and it is now being raised for the first time on appeal.

It is, of course, elementary that laches, like the statute of limitations, is an affirmative defense that must be alleged and proved by the defendants, and this is conceded. (Universal's Op. Br. p. 77.)

It is furthermore well established that such defense cannot be raised for the first time on appeal.

Ferryboatman's Union of Calif. v. Northwestern Pac. R. Co., 84 F. (2d) 773 (C. C. A. 9);

Ashton v. Glaze, 95 F. (2d) 427 (C. C. A. 9).

The cases relied upon by defendant Universal are not in point. For example, it cites the equity case of *Haas v. Leo Feist, Inc.*, 234 Fed. 105, but fails to comment upon or inform this Court of Judge Learned Hand's true

opinion on laches, for immediately following the language quoted by defendant Universal, the Court said:

“If the defendant be a *deliberate* pirate this consideration (laches) might be irrelevant and I think it such. . . .” (at p. 108.)

The other cases cited by defendant Universal are so completely inapplicable as to hardly merit comment. However, as an aid to this Court, we briefly refer to some of them.

Window Glass Mac. Co. v. Pittsburgh Plate Glass Co., 284 Fed. 645 (Universal’s Op. Br. p. 72) was an action *in equity* for patent infringement. Plaintiff, after threatening defendant with an action, *delayed eleven years in filing its suit*, during which time the defendant, relying on plaintiff’s apparent approval, made large expenditures. The very headnote of this case recognized the general rule, for it states:

“Mere delay will not ordinarily bar a suit for an injunction against a naked infringer. . . .”

Gillons v. Shell Co. of California, 86 F. (2d) 600 (Universal’s Op. Br. p. 73), likewise was an action *in equity* for patent infringement, where plaintiff *delayed for nine years* before bringing suit, although he had notice of defendant’s alleged infringement. Here there was actual proved prejudice to the defendant.

Hardt v. Heidweyer, 152 U. S. 547, was a creditor’s suit *in equity* where plaintiff delayed for over *five years*

before bringing suit after full knowledge of all of the facts.

Rome Grader & Mfg. Corp. v. J. D. Adams Mfg. Co., 135 F. (2d) 617, was an action *in equity* for patent infringement where the plaintiff waited *nine years* before bringing suit and where there would have been actual prejudice to the defendant had plaintiff's action been maintainable.

Preston v. Kaw Pipe Line Co., 113 F. (2d) 311, was an action *in equity* to secure a portion of the profits from an oil lease where the plaintiff had *waited fourteen years* before bringing his action, after sitting back and waiting to see whether operations would be financially successful.

Valvoline Oil Co. v. Havoline Oil Co., 211 Fed. 189 (Universal's Op. Br. p. 74), was an *equitable* action involving unfair competition and alleged trademark violation where plaintiff knew of defendant's actions many years before bringing suit, during which time defendant had expended large sums of money without objection on the part of plaintiff.

Vacuum Cleaner Co. v. Innovation Elec. Co., Inc., 234 Fed. 942, was an action *in equity* for alleged patent infringement. There was a five year delay, during which time plaintiff allowed the defendant to believe that no action would be taken. In this case a decree for the plaintiff was entered, the Court merely excluding the five year period from an accounting for profits.

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Pollitzer v. Foster, 59 F. (2d) 901 (Universal's Op. Br. p. 75), involved an action *in equity* for alleged patent infringement. Here plaintiff waited *five years* after abandoning a prior suit before filing his action and then *delayed an additional eleven years* before bringing the case to trial.

No additional comment is needed to point out the complete inapplicability of defendants' cases to the case at bar, where the uncontradicted evidence is that defendants deliberately misappropriated plaintiff's copyrighted material and plaintiff's attorney was instructed to give written notice of infringement "not very long" after Lloyd's attention was first directed to the infringements. [Tr. p. 153; Ex. G, Tr. pp. 386, 387.] Laches was neither pleaded nor proven and in an action at law for damages, has no application whatsoever; it is a defense only in an equitable proceeding when affirmatively pleaded and proven. (19 *Am. Jur.* (Equity), Sec. 489, *et seq.*)

(B) No Issue of Equitable Estoppel Was Presented in the Trial Court or Is Substantiated by the Record.

As usual, Universal's counsel completely distort and flatly misstate the record in their opening brief at page 77 when they state that the written notice of infringement [Defendant's Ex. G, Tr. pp. 386, 387] "was offered to establish an estoppel and was received in evidence for such purpose without objection."

For the first time upon this appeal we are now advised that the purpose for which our notice of infringement was

offered by defendants was “to establish an estoppel.” Such purpose was not disclosed in any way at the trial; an estoppel had not been pleaded by defendants, and in fact defendant Universal’s answer not only admitted it had received the written notice of infringement dated March 20, 1945, but furthermore admitted that since the receipt of such written notice “defendant has continued with the distribution and exhibition of said motion picture photoplay.” [Tr. p. 20, par. II.] It is quite true that plaintiff did not object to this pleaded notice being received in evidence. There was no contention by anyone that it had not been sent or that it had not been received or that it was anything else than what it purported to be, to wit: “the first written communication from the plaintiff’s attorney.” [Tr. p. 385.] Plaintiff’s counsel refused to stipulate that this letter was “the first notice of any claim” [Tr. p. 385] because defendants were at all times on notice that they were misappropriating plaintiff’s property. Obviously no estoppel can be predicated upon facts known to the defendants and unknown to the plaintiff.

The cases cited by defendant Universal are completely dissimilar.

In *Haskins v. Rosenberg*, 119 F. (2d) 803 (Universal’s Op. Br. p. 77), the action was in equity to quiet title to real property. The defendant’s answer specifically alleged laches as a defense and the only question before the Court was whether such a defense was broad enough to cover a Nevada statute of limitations where such statute

and its application had been argued in the Trial Court and was considered by all parties in issue.

Vernon Lbr. Corp. v. Harcen Const. Co., 155 F. (2d) 348 (Universal's Op. Br. p. 78), also involves a situation where the issue was expressly litigated in the Trial Court, and where the Court said that counsel "admitted during the trial that it (defense of waiver) was one of the major defenses to the counter-claim." (At p. 349.)

In *Pearl Assur. Co. Ltd. v. First Liberty Natl. Bank*, 140 F. (2d) 200 (likewise relied upon by Universal), the Court said:

"It is clear that one of the issues upon which the case was tried was whether or not there had been a waiver by the defendant of the provisions of the policy. . . . The question of waiver was definitely an issue in the trial of this case, in which evidence was introduced on both sides." (At p. 202.)

In the instant case, neither laches nor estoppel were pleaded nor proven and the statement that the plaintiff's notice of infringement was received in evidence "to establish an estoppel" or that the issue of estoppel "developed upon the trial" and in accordance with the stipulation of plaintiff's counsel, is a complete distortion of the record and is wholly untrue.

POINT VI.

Appellant Bruckman Is a Joint Tort Feasor Jointly Liable as a Contributory Infringer for All Damages Sustained Through Infringement Upon Plaintiff's Copyright.

Appellant Bruckman cites no cases which support his contention that he is not liable for damages as a contributory infringer. (Bruckman Op. Br. pp. 61-62.) *Washingtonian Pub. Co. v. Pearson*, 140 F. (2d) 465, cited by Bruckman, relates solely to the proposition that one infringer cannot be held responsible for profits collected by another infringer. Certainly in view of the uncontradicted evidence in this case appellant Bruckman cannot contend that he is "in no way connected with or responsible for . . . the infringements."

The finding of the Trial Court was that the individual defendant Clyde Bruckman was employed by the defendant Universal Pictures Co., Inc., in the capacity of writer and to assist in the writing of a certain motion picture photoplay entitled "So's YOUR UNCLE," and that one thousand feet of film were "knowingly, wilfully and deliberately copied, misappropriated and plagiarized by defendants and each of them." [Finding of Fact VII, Tr. pp. 34-35.] This finding was abundantly supported by the evidence and by Bruckman's own testimony that he had "patterned" the corresponding sequence in defendant's motion picture upon the sequence done in plaintiff's picture. [Tr. p. 96.]

The contention that the writer primarily responsible for pirating copyrighted material is to go quit of liability, is not new or novel. Each time that the contention has been raised, it has been held that the writer is liable for

damages as a contributory and participating infringer and joint tortfeasor. The fact that the writer does not himself project the infringing motion picture upon the screen does not bar recovery of damages because it is an essential part of the production of the picture which results in the infringement of the plaintiff's rights.

In *Cain v. Universal Pictures Co.*, 47 Fed. Supp. 1013 (D. C. Sou. Dist. Cal.), Judge Yankwich expressly held that a writer would be liable who deliberately pirated a copyrighted work:

"Infringement of copyright consists (1) of the alleged copying of a part of the plaintiff's work, and its inclusion in the scenario for the purpose of its (2) incorporation into the finished motion picture, (3) for exhibition purposes. If Taylor appropriated, as the complaint alleges, a portion of the plaintiff's work and turned it over to the other defendants, *his connection with the picture did not end then*. The material was intended by him to be used in the motion picture to be produced from the story, which was to be exhibited to the public on its completion and release.

"So the wrong done to the plaintiff in a case of this character does not lie in the mere copying of his material, which, without publication or incorporation into a motion picture, would result in no injury to him. It consists of (1) the deliberate appropriation of a portion of his work and its delivery to others for (2) inclusion in the finished picture and (3) exhibition to the public.

"Therefore, conceding that the actual distribution of the picture, following its original release, was done by others than Taylor, the action is not barred,

as to him, by the expiration of two years from the date of release. For *the continuous exhibition of the picture is one of the aims of the composition of the script by him. He is, therefore, chargeable not only with the act of composing the screen play, but is also a participant in its incorporation into the motion picture and its subsequent exhibition.*"

In *Harris v. Miller*, 50 U. S. P. Q. 625 (D. C. S. D. N. Y.), the authors of the infringing play were held to have "aided and abetted in the production of the play by furnishing the use of the infringing manuscript for which they received a royalty; they are jointly liable with the other defendants for the plaintiff's damages."

Gross v. Van Dyke Gravure Co., 230 Fed. 412, 414, 144 C. C. A. 554 (2d C. C. A.):

"Why all who unite in an infringement are not, under the statute, liable for *damages* sustained by plaintiff we are unable to see . . . as all united in infringing, all are responsible for damages resulting from the infringement."

American Telephone v. Radio Audio, 281 Fed. 200, 203:

". . . Joint infringers are joint tort feasons. An infringer and one who induces or contributes to the infringement are likewise liable *in solido* and so may be joined as defendants."

In *Towle v. Ross*, 23 Fed. Supp. 125 (D. C. Ore.), the Court held employees to be liable even when their employer was the U. S. Government and was immune from liability, the Court stating:

"The position of defendants as employees of the U. S. cannot protect them from the award of dam-

ages. The immunity of the sovereign cannot in a republic immunize its agents also. The acts were done for the benefit of the government by the employees thereof.”

The general rule is stated by *Herbert A. Howell, Assistant Registrar of Copyrights*, in his book on “*Copyright Law*” at p. 152:

“While tort feasons are jointly and severally liable for the damages sustained by the plaintiff, they may not be severally liable for any profits in which they did not share.”

Since Bruckman received no profits, his counsel is particularly anxious to have this pirate absolved from all financial responsibility for his piracy; although he deliberately misappropriated the plaintiff’s property after concededly receiving from the Harold Lloyd Corporation \$21,459 for his services as a writer and an additional sum of \$21,441 for his services as director upon the motion picture “*MOVIE CRAZY*.” [Plaintiff’s Ex. 2, Tr. p. 174.]*

Certainly Bruckman’s moral and legal delinquency in betraying and stealing from his former employer does not commend him to the leniency of this Court.

*Bruckman is alleged in plaintiff’s complaint to have received an aggregate of \$135,000 during his period of employment by the plaintiff corporation. [Tr. p. 3.]

Conclusion.

Appellants deliberately misappropriated plaintiff's property.

Their contentions upon appeal are as unjustified as their original piracy.

Their respective appeals should be dismissed, with counsel fees awarded to plaintiff's attorney as part of plaintiff's costs on appeal.

Respectfully submitted,

HAROLD A. FENDLER,

Attorney for Appellee Harold Lloyd Corporation.

APPENDIX I.

Illustrative False, Erroneous or Misleading Statements in Appellant Universal's Opening Brief.

PAGE 1.

Defendant Universal states that its appeal is "from a judgment holding that plaintiff's copyright . . . has been infringed by the use of six 'gags' or pieces of 'stage business' used in a comedy routine." *In fact*, the findings and judgment hold infringement of 57 consecutive scenes, including characters, characterizations, motivation, treatment and sequence of action consisting of an entire sequence in plaintiff's motion picture. [Tr. p. 42, par. 34.]

PAGE 2.

Defendant Universal purports to summarize the pleadings but *omits* the most important admission contained in its verified answer, to wit, that after receipt of plaintiff's written notice of infringement, it "admits that said defendant has continued with the exhibition of said motion picture photoplay." [Tr. p. 20, par. 2.] Written notice was given by plaintiff's attorney March 20, 1945; Universal's answer was verified June 2, 1945. [Tr. p. 21.]

PAGES 3-6.

Defendant Universal's purported synopses of plaintiff's and defendants' motion pictures reduce *10 pages* of the screen play and 57 consecutive scenes in each photoplay to *10 lines*, omitting all details of dialogue, characterization, motivation, treatment, arrangement and sequence of scenes, etc.

PAGE 7.

Defendant Universal states: "The *first notice* of plaintiff's claim was in a written communication received by defendant Universal from plaintiff's attorney under date of March 20, 1945." *In fact*, Universal had notice at all times during production and distribution through its writer Bruckman and its producer Yarbrough that Lloyd's material was being used. [Finding VII, Tr. p. 34; Bruckman, Tr. p. 96.]

PAGE 7.

Defendant Universal states that plaintiff "offered no evidence to refute defendants' proof that plaintiff had *deliberately* failed to notify defendants of the alleged infringement until over fifteen months." The truth is that defendants offered *no proof* plaintiff ever had any notice of the piracy of plaintiff's picture prior to March, 1945, and plaintiff's evidence showed the matter was placed in the hands of plaintiff's attorney "not long after" the matter was first called to Lloyd's attention. [Tr. p. 153.]

PAGE 8.

Defendant Universal states that Lloyd testified to the re-issue and re-make values of his own picture "without the proof of any facts to support the same." *In fact*, Lloyd's testimony showed his vast experience in production, distribution and "practically everything that there is to do with the motion picture." [Tr. pp. 98-99.] None of this testimony is quoted or referred to by defendants who did not object to Lloyd's qualifications at the trial nor to his testimony that an old motion picture had value as "a story to be sold to others" or for "re-make" or "re-issue." [Tr. pp. 107-108.]

PAGE 9.

Defendant Universal states that "the only example" which Lloyd could give of a re-issue was Chaplin's "Gold Rush." *In fact*, defendants' counsel objected to any specific examples being given by Lloyd and defendants' objections were sustained upon the grounds that the offered testimony was "irrelevant, immaterial and incompetent." [Tr. pp. 106-107.] Defendants' counsel would not even permit Lloyd to complete his voluntary statement about "The Gold Rush" for the reason that Lloyd was asking permission "to specify pictures which he desires to compare." [Tr. pp. 110-111.] *How can defendants claim Lloyd could give only one example of reissue when they prevented his giving more examples or specifying further pictures?* Defendants' own evidence completely corroborates Lloyd's testimony that reissuing a picture is a "well known practice in the industry." [See Hirliman's testimony his company bought during the last three or four years the reissue rights to seven Selznick International pictures; 35 Gaumont British pictures; 34 Samuel Goldwyn pictures, etc. Tr. pp. 422-425.]

PAGE 9.

Defendant Universal states that Lloyd "first testified that the remake rights to one of his pictures 'Milky Way' had been sold [Tr. p. 136]. He was later *obliged to admit* that the picture does not belong to me [Tr. p. 354]." This is a deliberate attempt to confuse the Court. Lloyd had starred in "Milky Way" for Paramount. He never testified that he owned or had sold the re-make rights to this picture. The testimony first quoted by defendants *omits* Lloyd's testimony that Paramount (not himself) had sold the re-make rights of Milky Way to Goldwyn. [Tr. p.

136.] Lloyd was *not* "later obliged to admit" the picture did not belong to him because he had testified in the first instance that it was Paramount which had made the sale.

PAGE 10.

Defendant Universal states that Lloyd "conceded that it was not a common practice in the industry to reissue or remake old motion picture subjects." *In fact*, his testimony was exactly to the contrary:

"Q. Is that (reissuing a picture) a well-known practice in the industry? A. Yes, it has been done many times." [Tr. p. 106.]

* * * * *

"Q. Is remaking a picture a practice which is popularly engaged in in the motion picture industry? A. Very much so." [Tr. p. 106.]

PAGES 11-12.

Defendant Universal states that Lloyd "conceded that he was not qualified and in no position to express any opinion as to the availability or value" of reissue or remake rights (Br. p. 11); and that the Court "recognized that this testimony had completely disqualified the witness." (Br. p. 12.) *In fact*, Lloyd made no such concession and all of his evidence is to the contrary. [See Tr. pp. 98-111.] The testimony quoted by defendants [Tr. p. 309] refers to "interchange" of pictures between major studios and not to sale of reissue or remake rights. The details of an exchange of pictures or talent-for-pictures between two studios would ordinarily be known only to the participants in the deal. The Trial Court repeatedly referred to the fact that Lloyd was well qualified and had a "broad comprehension of the industry." [Tr. p. 303.]

PAGE 13.

Defendant Universal claims that the Paramount picture starring Lloyd entitled "THE MILKY WAY" had only been bought as a guide for making another picture and "*not for remake.*" In fact, Lloyd testified that Paramount had sold the *remake rights* of "MILKY WAY" to Goldwyn [Tr. p. 130] and offer of proof was repeatedly made that the sale price was \$125,000 in cash *plus* the loan-out of the services of Teresa Wright, an outstanding motion picture star. [Tr. pp. 29-31, 367-8, 492; see App. Lloyd's Op. Br. pp. 7-13 incl.] Lloyd testified that after Goldwyn bought the remake rights of "Milky Way" and while it was being made over that Goldwyn used the original picture "as a guide" while remaking scenes from the Paramount picture [Tr. p. 308]; Lloyd did *not* testify, however, that the picture had been "bought as a guide . . . and *not for remake.*" The latter part of Universal's statement is directly contradicted by the evidence.

PAGE 15.

Defendant Universal states that plaintiff's witness George R. Bentel had, since 1923, acted as "author's agent in the sale of *manuscript plays for stage production*"; and that he admitted on cross-examination that productions with which he had been associated were "limited to stage plays." *Neither statement is correct.* Bentel testified he had been vice-president and general manager of Oliver Morosco's productions and had made moving pictures with Louis B. Mayer and William N. Selig [Tr. p. 197], and that he represented the entire libraries of Edward E. Rose, Jack London, James Oliver Curwood and others. [Tr. p. 197.] The Court will take judicial notice that neither Jack London nor James Oliver Curwood were dramatists

noted for stage plays and the witness expressly testified for twenty years he had acted as literary broker and had familiarized himself "with the market for motion picture rights and the value of motion picture stories" [Tr. pp. 197-198] and with the value of reissue and remake rights of pictures. [Tr. p. 198.] Yet defendants state "without proof of any supporting facts (*e. g.*, without foundation) the witness was permitted to testify." It should be noted the *defendants failed to object at the trial that the witness had not qualified as an expert.* [Tr. p. 197.]

PAGE 16.

Defendant Universal states that plaintiff's witness Bentel testified "the *ordinary period* for the remaking of a picture is four years after its release." The fact is that Bentel did testify that "some" pictures have been remade within four years but gave numerous examples of pictures remade as "talkies" although originally done as "silents" sixteen to twenty-seven years previously. [Tr. p. 205.]

PAGES 17-18.

Defendant Universal states that plaintiff's witness Botsford testified with "no supporting facts" (Br. p. 17) and that he "knew of only one comedy picture 'Hold That Blonde' in the entire history of the industry that had ever been used for remake." (Br. p. 18.) *In fact*, the Court held Botsford "qualified" by "long years of experience in the industry" [Tr. p. 461] after Botsford had testified that he had been head of the Editorial Board at Paramount as executive assistant to the head of the studio at Paramount for five years and the producer of 15 or 16 pictures at Paramount, and that later on he was managing director of the A. & S. Lyon Agency. [Tr. pp. 453-6.] Botsford

did *not* testify he knew of only one comedy picture in the history of the industry which had been remade; on the contrary, he testified that during the course of his regime at Paramount between 1930 and 1941, Paramount had made comedies as well as other types of motion pictures. When he was asked to "name some of the comedies that were remade at Paramount" defendants objected to any specific examples and their objection was sustained by the Court. [Tr. pp. 456-457.] Subsequently, Botsford mentioned a Raymond Griffith comedy entitled "Hold That Blonde" which had just been remade by Paramount with Eddie Bracken and had just opened the previous night in Los Angeles. [Tr. p. 463.] On cross-examination he was asked whether "That is the only one you can think of" and replied, "I could probably give you more if I had a little time to think of them." [Tr. p. 470.]

PAGES 20-21.

Defendant Universal states that its witness Felix Adler testified that certain "stage business" was "taken by plaintiff" from old magicians' acts, etc. Adler did *not* so testify, although he did state he personally knew of prior use of certain incidents in different form and combination which were suggested by him to plaintiff's other writers for use in plaintiff's picture "Welcome Danger." [Tr. pp. 320-325, 328.] On cross-examination, after first denying that he and Bruckman copied the Lloyd sequence at Columbia [Tr. p. 335], he eventually admitted that he and Bruckman had written the sequence for the Columbia picture "with full knowledge that it had been in the Harold Lloyd picture 'Movie Crazy.'" [Tr. p. 337.]

PAGE 23.

Defendant Universal ascribes reasons purportedly given by their producer Yarbrough for making no objection to the use of the Lloyd sequence inserted by Bruckman in the Universal picture, such as "it was a common practice," etc. There is nothing whatever in the evidence to show Yarbrough's opinions or conclusions as to why he should or should not copy Lloyd's material, excepting only that Bruckman told him he "had used the material at Columbia" and that it was "suggested by and patterned on 'Movie Crazy.'" [Tr. pp. 96, 237.]

PAGE 23.

Defendant Universal states "the producer of the Columbia picture had authorized its use for the same reasons." There is no such testimony except that defendants' witness Adler attempted to justify Columbia's piracy by Bruckman and himself through the voluntary statement that "all comedians do the same gags." [Tr. p. 338.] Defendant Universal implies that Lloyd knew all about the infringing Columbia picture for two years prior to the release of Universal's infringing short and that such Columbia release proceeded "without plaintiff's objection." All of the evidence shows that Lloyd never heard of the Columbia picture until a few days before the trial of this action [Tr. p. 151]; and even Adler, defendants' witness and the writer of the infringing Columbia "short" testified, "I do not believe they play around here in Los Angeles; I have never seen a [that] Columbia picture here." [Tr. p. 336.]

PAGE 24.

Defendant Universal states that “the Court had said that none of the plaintiff’s witnesses were qualified to establish damage.” No such statement was ever made by the Court. Defendants’ references to the transcript are long before Botsford had testified; before Landau and Bentel had completed their testimony and before Lloyd had been called as a witness for the defendants.

PAGE 24.

Defendant Universal states that Lloyd admitted he had “no knowledge of any common practice of dealing in re-issue and remake rights.” *In fact*, Lloyd’s testimony is to the contrary. [See Tr. pp. 105, 106, 107, 369.]

PAGE 25.

Defendant Universal states that the Court recognized Lloyd was “not qualified to testify” as to practices in the industry. The Court did *not* so state; on the contrary, the Court commented on Lloyd as having “a broad comprehension of the industry.” [Tr. p. 303.]

PAGES 25-28.

Defendant Universal so distorts the testimony of their witness Hirleman so as to imply that he qualified as an expert on the value of “remakes” as well as “reissues”; and that he testified that the Lloyd picture had *neither* remake *nor* reissue value because “whether a picture has any remake value depends upon whether it has any re-issue value.” [Tr. p. 427.] This was *not* Hirleman’s

testimony which we quote verbatim from the transcript page referred to by defendants:

“(Testimony of George A. Hirleman):

The Witness: Well, I never buy for re-make purposes. I only buy first for re-issue and if it has re-make value that adds value to me, but if it had only re-make value I would not be interested in it.

The Court: So you don't know?

The Witness: I don't know so far as anyone else is concerned.

The Court: But *you have no opinion as to the re-make value?*

The Witness: *No, sir.*”

Hirleman thus expressly *disqualified* himself as an expert on “re-make” value as to which he stated to the Court he had “no opinion.” [Tr. p. 427.]

PAGE 29.

Defendant Universal states that “Lloyd had testified that the re-issue rights had never been sold, licensed or disposed of to any of his pictures.” Lloyd did *not* so testify; he stated Paramount had sold the re-make rights of “Milky Way” to Goldwyn [Tr. p. 136]; but that *he* had never had them up for sale. [Tr. p. 354.] Defendants’ witness Hirleman did *not* contradict Lloyd when he testified he bought certain re-issue rights in an old silent picture from *Pathe*. [Tr. p. 429.]

PAGE 30.

Defendant Universal states that there was “unimpeached testimony of *both* plaintiffs and defendants’ witnesses that such rights . . . had no re-issue value.” This is untrue. No plaintiff’s witness so testified. All of

plaintiff's expert witnesses, Lloyd, Botsford, Landau, and Bentel, contradicted—and thus impeached—the evidence of defendants' witness on this point. [See Lloyd, Tr. pp. 104, 105, 107; Landau, Tr. pp. 256, 258; Bentel, Tr. p. 203, Botsford, Tr. pp. 460-465.]

PAGE 30.

Defendant Universal prints parenthetically a statement by their own counsel relating to Lloyd's silent picture "Safety Last" in such a manner as if it were evidence given by defendants' witness Hirliman. This is grossly misleading because Hirliman did not so testify, and a statement by counsel is *not evidence*.

PAGE 31.

Defendant Universal states that Hirliman "was *plaintiff's* witness." *In fact*, Hirliman was called and testified solely on behalf of *defendants*. [See Tr. p. 420.]

PAGE 31.

Defendant Universal's description of Hirliman's testimony is completely inaccurate because the pages of the transcript referred to by Universal do not contain the language attributed to the witness such as "gags," "stage business," "comedy routine," "comedy accretion," etc. [See Tr. pp. 447-448.] These terms are supplied solely by Universal's counsel.

PAGE 33.

Defendant Universal states that the trial court "recognized that as this sequence was not a part of the general theme, it could be deleted without affecting the picture." The trial court did *not* so state and its oral opinion [Tr.

p. 520] and findings of fact are to the contrary. [Tr. p. 34.] During Hirleman's testimony, the trial court made it clear that defendants' testimony that the magician's coat sequence was not a material fact in the picture, was simply "wasting time" because the court said "I saw the picture and I have my own views as to the value of that sequence." [Tr. p. 447.] Previously, the trial court itself developed testimony that plaintiff's picture could not be re-issued without the sequence because the result is "that it would be a short; it would change the picture so it could not be issued in its present form." [See Tr. p. 140.]

PAGE 33.

Defendant Universal's counsel again injects the terms "gags," "stage business," and "comedy routine," stating that Lloyd "*conceded*" that the 57 consecutive scenes slavishly copied by defendants merely was a "sequence of gags," and that the court "acquiesced" in the contention that the "sequence of these 'gags' or 'stage business' was the subject of copyright protection and judgment was rendered on that basis." Lloyd did *not* so concede *nor* did the Court render judgment "on that basis." Lloyd did testify that there were "gags within the comedy scene" but expressly stated "those (57 consecutive) comedy scenes make up the whole sequence" [Tr. p. 137]; that "the whole sequence is naturally tied into the story; it is the heart of our story and without that particular sequence tied into the story it is certainly destroyed" [Tr. p. 147]; that the sequence is an "integral and essential part of the story and plot," and "plays a functional part in the development of the picture." [Tr. pp. 138-9.]

PAGE 35.

Defendant Universal states “The Court said that none of the plaintiff’s witnesses were qualified to evaluate such (re-issue or re-make) rights [Tr. pp. 303, 371.]” This is a repetition of the same untrue assertion made on page 24 and appears in somewhat different form on page 67 of Universal’s opening brief. No such statement was ever made by the Court. On the contrary, the Court commented on Lloyd’s “broad comprehension of the industry” [Tr. p. 303]; and expressly held Botsford to have “qualified” as “a man with long years of experience in the industry.” [Tr. p. 461.]

PAGE 35.

Defendant Universal states that “Lloyd *conceded* that he had no experience in that (distribution) end of the business.” *Lloyd made no such concession and testified to the contrary.* [Tr. pp. 98, 369.] In fact, the very page of the transcript referred to by defendant Universal shows that Lloyd testified he had been “injected into the distribution end of the business and all the other forms of the business.” [Tr. p. 369.]

PAGE 35.

Defendant Universal’s counsel states “The Court’s determination that such rights to plaintiff’s picture had a substantial value was based solely upon this (Lloyd’s) testimony.” The Court did *not* at any time make such a statement and it is obvious from the record that Lloyd’s testimony was fully corroborated by Botsford [Tr. pp. 453-464]; Landau [Tr. pp. 253-258], and Bentel [Tr. pp. 196-198, 203, 406, 410]. See our opening brief for cross-examination of appellant Lloyd, pages 20-24.

PAGE 35.

Defendant Universal states "all of plaintiff's witnesses conceded that no picture had ever been re-made and only one re-issued of this nature." (Br. p. 35.) This is a gross misstatement. Lloyd testified to Chaplin's "Gold Rush" having been re-issued [Tr. p. 364], and Lloyd's own "Milky Way" being currently re-made by Goldwyn. [Tr. pp. 368, 370.] Botsford testified that comedies had been re-made at Paramount during the eleven year period he was executive assistant to the head of the studio [Tr. pp. 456-7] but defendants' counsel *objected* to any names of such comedies being stated by the witness. [Tr. p. 457.] Previously he had mentioned a comedy entitled "Hold That Blonde" which had "opened" the night before Botsford testified and was a "re-issue" of a Raymond Griffith comedy. [Tr. p. 463.] Botsford expressly testified "I could probably give you more if I had a little time to think of them." [Tr. p. 470.] This evidence is directly contrary to defendant Universal's flat assertion that "plaintiff's witnesses conceded that no picture had ever been re-made and only one re-issued." (Br. p. 35.)

PAGES 35-37.

Defendant Universal makes the highly misleading argument that the trial court "assessed damages upon the erroneous theory . . . that it could add such arbitrary amount" of damages to defendant's profits as it might deem proper under the "in lieu of" provision of Section 25 of the Copyright Act. (Br. pp. 35-37.) The truth is that the trial court did *not* award "arbitrary damages" under the "in lieu of" provision of Section 25; nor did it "add" arbitrary damages to defendants' profits in reach-

ing its final determination as to the amount of actual damages sustained. The trial court clearly stated that it was fixing "*actual damages suffered*" by the plaintiff. [Tr. p. 522.]

PAGES 38-39.

Defendant Universal states the trial court *fixed such damages of \$40,000* upon the erroneous finding that defendant Universal continued to release and distribute its picture "with notice and knowledge of plaintiff's rights in the premises" and would continue so to do "unless permanently restrained and enjoined from so doing." (See also, Universal's Brief, p. 71.) No statement could be more misleading or farther from the truth. The damages were not "fixed" nor "based" upon the injunctive finding; and that finding was *not* erroneous because, as we shall show, it was predicated upon admissions in the defendant's answer [Tr. p. 20, Par. II], and upon statements of defendant's counsel. [Tr. pp. 345, 452.]

Damages which had accrued prior to the institution of the lawsuit and which were pleaded [Tr. p. 5] and proven [Tr. pp. 35-36, Par. IX and X] had no relation to the injunction or supporting finding of continued distribution with notice and knowledge of plaintiff's rights. [Par. IX, Tr. p. 36.]

Plaintiff's first cause of action was solely for damages accrued prior to April 4, 1945, the date complaint was filed [Tr. p. 7] and defendant's own evidence showed Universal's writer Bruckman and Universal's producer Yarbrough were at all times prior to that date and during the production of the picture, fully informed that Universal's sequence was patterned after the Harold Lloyd sequence in "Movie Crazy." [Tr. pp. 95-96.] The trial court's finding of "notice and knowledge" is, therefore,

not erroneous, but is based upon defendant's own uncontradicted evidence.

The finding objected to by appellant Universal is furthermore based upon the admissions contained in its answer to plaintiff's second cause of action, as follows [Tr. p. 20, Par. II]:

"This answering defendant admits that on or about the 20th day of March, 1945, plaintiff gave this defendant a notice in writing demanding that said defendant cease and desist from further distribution, exhibition, or release of said defendant's motion picture photoplay entitled 'So's Your Uncle,' and *admits that said defendant has continued with the distribution and exhibition of said motion picture photoplay.*" [Tr. p. 20.]

Defendant Universal verified this answer June 2, 1945. [Tr. p. 21.]

On September 13, 1946, *six months after the written notice*, Universal's counsel stated in open court that the picture "*will be*" withdrawn [Tr. p. 345] not that it had been withdrawn; and later Universal's counsel expressly stated he did not contend that plaintiff was not entitled to an injunction [Tr. p. 452]:

"Mr. Fendler: You do not contend the plaintiff is not entitled to an injunction, do you?

"Mr. Abeles: No."

Universal repeats its misstatement about damages being "based upon" the injunctive finding in Point VI of its opening brief (pp. 71, 72); but it is apparent from the record that finding of fact XI [Tr. p. 36] is fully supported by the stipulations and statements of defendant's counsel, by the evidence, and by the admission in Universal's verified answer.

Explanatory Note.

The foregoing 35 instances are not intended to represent all of the false, erroneous, or misleading statements contained in Universal's Opening Brief but are merely illustrative. There are many additional such statements and innumerable repetitions thereof in the first 38 pages as well as in the balance of that brief.

Appellant Universal's legal argument is largely predicated upon erroneous summaries of the evidence or of the findings made by the trial court. This brief contains our answers thereto. (See particularly Points III, IV and V, *supra*.)

Upon all questions of fact we respectfully refer the court to the record.

APPENDIX II.

"The Deadly Parallel."

The sequence of incidents and action common to plaintiff's picture "Movie Crazy" and defendant's picture "So's Your Uncle."

"MOVIE CRAZY"

SCENE: INTERIOR MAGICIAN'S DRESSING ROOM.

Poster on wall establishes this is the room of HENRY THE GREAT, a magician. Other signs and props signify the same thing. A magician's assistant is preparing his full dress coat, putting things into the pockets, etc. The coat is lying over the back of a chair. The assistant squeezes a bulb concealed in the coat and water squirts from a flower in its lapel. (Reel 7, Scene 22.)

SCENE: INTERIOR LARGE LUXURIOUSLY APPOINTED HOTEL NIGHT CLUB.

Harold arrives at Mary's table wearing magician's coat and is introduced to other guests at table. He commences to dance with Mrs. Kitterman. A miniature clothes line begins to appear from Harold's coat and as Harold dances away the line stretches out, revealing thereon miniature lingerie and other clothes. Finally, the end of the

"SO'S YOUR UNCLE"

SCENE: INTERIOR MAGICIAN'S DRESSING ROOM.

Poster on wall establishes this is the room of the GREAT VAN DINI, a magician. Other signs and props confirm this. The magician is preparing his full dress coat, putting things into pockets, etc. The coat is lying over the back of a chair. He squeezes a bulb in the coat and water squirts from a flower in its lapel. (Reel 4, Scene 2.)

SCENE: INTERIOR LARGE LUXURIOUSLY APPOINTED NIGHT CLUB.

Steve arrives at Pat's table wearing magician's coat and is introduced to other guests at table. He commences to dance with Pat. A bird suddenly flies up between Steve and his partner, apparently coming from Steve's coat and lights on a woman dancer's head to her consternation. . . . A miniature clothes line begins to appear

("Movie Crazy")

laundry line comes loose. Harold does not appear to realize it has come from his coat. Suddenly a bird flies up between Harold and his partner, apparently coming from Harold's coat and lights on a man dancer's head, to his consternation. (Reel 8, Scenes 2-6.)

SCENE: CLOSEUP OF DRUNK SEATED AT RINGSIDE TABLE ADJOINING DANCE FLOOR.

He is at that stage of inebriation characterized by glassy eyes, delayed reflexes, and an amiable though somewhat foggy attitude toward anything happening around him or to him. A fly lands on his forehead and he tries to dislodge it. He slaps at it violently with his left hand and seems well pleased with the effect since the fly is gone. But the fly comes back and lands on his forehead again. He is annoyed and seems about to slap at the fly once more.

CAMERA PANS to Harold dancing.

INSERT: An egg drops from Harold's coat sleeve and into his hand.

CLOSEUP: Harold, a startled expression followed by a look of dismay appears on Harold's face. He holds egg up and

("So's Your Uncle")

from Steve's coat and as Steve continues dancing, the line stretches out, revealing miniature lingerie and other clothes. Finally, the end of the laundry line comes loose. Steve does not appear to realize it has come from his coat. (Reel 4, Scenes 6-11.)

SCENE: CLOSEUP OF DRUNK SEATED AT RINGSIDE TABLE ADJOINING DANCE FLOOR.

He is at that stage of inebriation characterized by glassy eyes, delayed reflexes, and an amiable though somewhat foggy attitude toward anything happening around him or to him. A fly lands on his forehead and he tries to dislodge it. He slaps at it violently with his left hand and seems well pleased with the effect since the fly is gone. But the fly comes back and lands on his forehead again. He is annoyed and seems about to slap at the fly once more.

CAMERA PANS to Steve dancing.

INSERT: An egg drops from Steve's coat sleeve into his hand.

CLOSEUP: Steve, a startled expression followed by a look of dismay appears on Steve's face. He holds egg up and looks

(“Movie Crazy”)

looks at it with a harassed and baffled air. He is trying desperately to find something to do with the egg.

The drunk swats at the fly once more and misses. . . . Harold drops the egg into the drunk's hand which is held in readiness to swat the troublesome fly once more. The fly lands on his forehead once more, and with a final violent effort, he slaps at it with the hand containing the egg. The egg breaks messily and covers him with goo which does not seem to upset him at all. (Reel 8, Scenes 16-22.)

SCENE: MEDIUM SHOT
OF HAROLD DANCING
WITH PARTNER ON
DANCE FLOOR.

While Harold is dancing and for no apparent reason, he suddenly gives two or three convulsive jerks. Something is obviously bothering him but he doesn't seem to know what it is. However, after a moment, he reaches into the tail pocket of his coat and brings forth a live white rabbit.

As they dance, Harold holds the rabbit behind Mrs. K.'s back, looking about over her shoulder with the bewildered expression of a man who wants to dispose of a live white rabbit on the

(“So's Your Uncle”)

at it with a harassed and bewildered air. He is trying desperately to find something to do with the egg.

The drunk swats at the fly once more and misses. . . . Steve drops the egg in the drunk's hand which is held in readiness to swat the troublesome fly once more and with a final violent effort, he slaps at it with the hand containing the egg. The egg breaks messily and covers him with goo, which does not seem to upset him at all. (Reel 4, Scenes 13-22.)

SCENE: MEDIUM SHOT
OF STEVE DANCING
WITH PARTNER ON
DANCE FLOOR.

While Steve is dancing and for no apparent reason, he suddenly gives two or three convulsive jerks. Something is obviously bothering him, but he doesn't seem to know what it is. However, after a moment, he reaches into the tail pocket of his coat and brings forth a live white rabbit.

As they dance, Steve holds the rabbit behind Pat's back, looking about over her shoulder with the bewildered expression of a man who wants to dispose of a live white rabbit on the

(“Movie Crazy”)

dance floor of a night club without it being known.

Harold tries to think of something to do with the rabbit when suddenly he sees the solution; a waiter with a large covered silver platter.

As the waiter passes Harold, he pauses a moment, turning away from Harold, giving Harold an opportunity to put the rabbit on the platter, replacing the cover.

The waiter goes on to the table of the same drunk who earlier broke the egg against his forehead and removes the cover over the platter while the drunk's eyes widen in astonishment as he sees the live rabbit.

Convinced by this weird sight that he has had too much to drink, the drunk rises and staggers away. (Reel 8, Scenes 25-29.)

MEDIUM CLOSEUP OF
HAROLD AND MRS. K.

Harold puts hands on his hips. As he does so, water squirts from the flower in his lapel into Mrs. K.'s face. Harold isn't aware that he has caused this. Mrs. K. gives a little scream and wipes her face with her handkerchief. Harold, noticing this, assumes it to be perspiration. Harold says, "It's warm, isn't it?" Mrs. K. replies. "Why, yes. Yes, it—it is."

(“So's Your Uncle”)

dance floor of a night club without it being known.

Steve tries to think of something to do with the rabbit, when suddenly he sees the solution; a waiter with a large covered silver platter.

As the waiter turns away from Steve at the drunk's table, he gives Steve an opportunity to put the rabbit on the platter and replace the cover.

The waiter sets the covered platter before the drunk who earlier broke the egg against his forehead and removes the cover while the drunk's eyes widen in astonishment as he sees the live rabbit.

Convinced by this weird sight that he has had too much to drink, the drunk "rises terrified," then falls on floor. (Reel 4, Scenes 28-31.)

MEDIUM CLOSEUP OF
STEVE AND MRS. B.

Steve bows toward Mrs. Bufington. As he does so, water squirts from the flower in his lapel into Mrs. B.'s face. Steve isn't aware that he has caused this. Mrs. B. gives a little scream and wipes her face with her handkerchief. Steve noticing this, assumes it to be perspiration. Steve says, "It is warm tonight, isn't it?" Mrs. B. replies, "It is certainly."

(“Movie Crazy”)

Water again squirts into Mrs. K.'s face and once more she wipes it as CAMERA TRUCKS to show a couple at a nearby table where a man is flipping water at his girl with his finger from a glass on the table. Mrs. K., seeing this, picks up a glass of water and with righteous indignation throws it into the man's face. (Reel 8, Scenes 30-31.)

SCENE: HAROLD AND PARTNER DANCING:

Both are blithely unaware of the fact that a little mouse is sitting on Harold's shoulder. Mrs. Kitterman and her partner dance into scene and Mrs. Kitterman and Harold bump into each other as they dance back to back. This dislodges the mouse from Harold's shoulder and it falls down the back of Mrs. Kitterman's evening dress. She screams and then continues to scream at frequent intervals as she squirms and twists, clutching at the back of her dress, trying to get rid of the mouse. Harold watches the commotion, completely unaware of having any connection with it.

Suddenly Harold becomes aware of something else in the tail of his coat and investigating, brings forth a small box filled with a number of other

(“So's Your Uncle”)

Water again squirts into Mrs. B.'s face and once more she wipes it as CAMERA TRUCKS to show a couple at a nearby table where a man is stirring water with his finger from a glass on his table. Mrs. B., seeing this, picks up a glass of water and with righteous indignation throws it into the man's face. (Reel 4, Scenes 25-27.)

SCENE: STEVE AND PARTNER DANCING:

Both are blithely unaware of the fact that a little mouse is sitting on Steve's shoulder. Mrs. Buffington and her partner dance into scene and Mrs. Buffington and Steve bump into each other as they dance back to back. This dislodges the mouse from Steve's shoulder and it falls down the back of Mrs. Buffington's evening dress. She screams and then continues to scream at frequent intervals as she squirms and twists, clutching at the back of her dress, trying to get rid of the mouse. Steve watches the commotion, completely unaware of having any connection with it.

Suddenly Steve becomes aware of something else in the tail of his coat and investigating, brings forth a small box filled with a number of other

(“Movie Crazy”)

mice. Aghast at this discovery he drops the box on the dance floor. CLOSEUP OF BOX ON FLOOR: Mice scamper away in all directions.

MEDIUM LONG SHOT OF DANCE FLOOR:

General pandemonium has broken loose, people are running in all directions, women screaming, etc. (Reel 8, Scenes 40-48.)

CLOSEUP: Girl petrified with fright: CAMERA PANS down her legs revealing a mouse crawling up one leg. As she raises her skirt before the mouse's upward advance we discover that she has been indulging in stealing some silverware which she has placed in her garters. (Reel 8, Scene 50.)

MEDIUM SHOT: of a girl about to climb on a table when a young man of what one might call the “dainty” type, places a hand on her shoulder pulling her down from the table and gets on it himself instead. He pulls his trouser legs up a little and dances in fright upon the table top, screaming in lady-like terror.

(“So's Your Uncle”)

mice. Aghast at this discovery he drops the box on the dance floor. CLOSEUP OF BOX ON FLOOR: Mice scamper away in all directions.

MEDIUM LONG SHOT OF DANCE FLOOR:

General pandemonium has broken loose, people are running in all directions, women screaming, etc. (Reel 4, Scenes 34-45.)

CLOSEUP: Girl petrified with fright: CAMERA PANS down her legs revealing a mouse crawling up one leg. As she raises her skirt before the mouse's upward advance we discover that she has been indulging in stealing some silverware which she has placed in her garters. (Reel 4, Scenes 48-50.)

MEDIUM SHOT: of two girls about to climb on a table when a young man of what one might call the “dainty” type, steps between them, and putting a hand on the shoulder of each, prevents them from getting on the table and gets on to it himself instead. He pulls his trouser legs up a little and dances in fright upon the table top, screaming in lady-like terror.

(“Movie Crazy”)

MEDIUM CLOSE SHOT: Same young man screaming and waving his hands with his trousers now pulled up almost to his knees. People rush past in all directions. (Reel 8, Scenes 53-55.)

CLOSE SHOT OF MAGICIAN: As magician takes his coat from Harold, he says: “I ought to knock your block off.” (Reel 8, Scene 56.)

(“So’s Your Uncle”)

MEDIUM CLOSE SHOT: Same young man screaming and waving his hands with his trousers now pulled up almost to his knees. People rush past in all directions. (Reel 4, Scene 46.)

CLOSE SHOT OF MAGICIAN: As magician takes his coat from Joe, he hits him on chin and knocks him to floor. (Reel 4, Scene 56.)

